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46

THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND
STATUTES CITED.

EDITED BY
HERMAN COHEN,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE PHILLIMORE.

GEORGE POWELL.

1909
20 *August.*

George Powell.

On a trial for receiving stolen property the evidence of the thief that he has sold stolen property to the defendant at any previous time is admissible to prove guilty knowledge; it is not affected by the time limitation of 34 & 35 *Vict.* c. 112, s. 19 (*the Prevention of Crimes Act*).

This was an appeal from an order of the Lord Chief Justice refusing leave to appeal against conviction and sentence on the facts, an appeal against conviction on points of law (which was in the Summary List), and an application for leave to call further evidence and for bail.

The appellant was convicted before the Recorder at the Central Criminal Court on July 24th, 1909, of receiving stolen property, and sentenced to three years' penal servitude.

Martin O'Connor for the appellant, who was not present.

Appellant was charged with receiving three plated articles which had been stolen, and were found in his possession. The only substantial evidence against appellant was that of the thief, which was not sufficiently corroborated. A dealer had given evidence that one of the articles was sold at a price below its value, but appellant had denied this in the box. The evidence of an accomplice alone was not sufficient, and the Recorder did not tell the jury what was meant by a corroboration in a *material* circumstance. *Everest*, 2 Cr. App. R. 130; 73 J. P. 269 (1909); *Warren*, 2 Cr. App. R. 194; 25 T. L. R. 633 (1909). He said that the fact that other stolen property was found in appellant's shop was evidence against him that he was in the habit of receiving stolen property. This was a clear misdirection.

Secondly, evidence had been improperly admitted against appellant. The thief had been called to say that he had sold

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20 *August.*

George Powell.

other property found in appellant's shop as stolen property. This was inadmissible; because sect. 19 of 34 & 35 Vict. c. 112, the Prevention of Crimes Act, 1871, only allowed evidence to be given that there was found in the possession of the person charged other property stolen within the preceding period of twelve months, and not that such property had been sold as stolen property.

[PHILLIMORE J.: But the thief's evidence was admissible under the common law to rebut evidence given to prove the honest intention of the receiver.]

Thirdly, the sentence was too severe. The appellant had been in business forty years, and had never been convicted previously.

The LORD CHIEF JUSTICE: We are asked to say that there was not sufficient corroboration of the evidence of the accomplice, and that the judge misdirected the jury as to convicting upon the evidence of an accomplice alone. The Recorder gave the clearest direction that the jury should not convict upon the uncorroborated evidence of an accomplice. Here there was sufficient evidence for conviction without the evidence of the accomplice. The stolen goods had been bought at an undervalue, and one of them had been concealed; and a large quantity of other stolen property was found in appellant's possession. It was not necessary to rely on the statute for proving the conversation between the thief and the receiver as to the sale of the former stolen property. The possession of recently stolen property throws on the possessor the onus of shewing that he got it honestly. As to the sentence, there is not the slightest ground for interference.

Applications and appeal dismissed.

Solicitor for the Appellant—*Blackwell & Co.*

George Williams.

GEORGE WILLIAMS.

The Court has no jurisdiction over remanet *sentences.*

This was an application for extension of time in which to lodge an appeal, and for leave to appeal against conviction and sentence.

Applicant was sentenced by the Chairman of the County of

George Williams.

London Sessions, on July 22nd, 1908, to fifteen months' imprisonment with hard labour, for attempting to break and enter a dwelling-house. He had served nearly the whole of that sentence, and was now detained in prison to serve the *remanet* (of two years and 193 days) of a previous sentence of six years' penal servitude passed at the Middlesex Sessions, on October 19th, 1901, for housebreaking (when there were already five previous convictions).

Applicant in person : He desired to have an extension of time in which to appeal against the sentence passed on him in 1908. He was now being wrongly detained in prison to complete the other sentence. The two sentences ought to have run concurrently.

The LORD CHIEF JUSTICE : This Court has no jurisdiction. If the applicant is being wrongly detained to serve the *remanet* of an old sentence, that is a matter for a writ of *Habeas Corpus*. Under the colour of a supposed appeal against his conviction in 1908, appellant seeks to raise the question whether he is properly detained under a *remanet* of another sentence.

That is not a matter for this Court.

Application refused.

ALBERT HAUSMANN, ALFRED MOSER, AND OSCAR SCHMIDT.

Albert Hausmann, Alfred Moser and Oscar Schmidt.

Sect. 20 (2) *of the Criminal Appeal Act*, 1907.

An information by the Attorney-General in the King's Bench Division for smuggling is not a "criminal information" within this sub-section, and therefore there is no appeal from conviction in such a case to this Court.

These were appeals against conviction, upon leave granted by the Lord Chief Justice, and against his Lordship's order refusing leave to be present.

The three appellants were found guilty by a special jury on July 22nd, 1909, of smuggling saccharin upon an information by the Attorney-General, and adjudged by Phillimore J. (under sect. 186 of 39 & 40 Vict. c. 36, the Customs Laws Consolidation Act, 1876), to pay a penalty of treble the duty-paid value (1,694*l.* in all). Immediate execution was granted, but the sum had not been paid, and the defendants remained in prison.

Harold Brandon for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present, confined himself to the question whether the proceedings, being an information by the Attorney-General on the Revenue side of the King's Bench Division, were criminal or civil proceedings. The authorities seemed to indicate that the proceedings were civil, and that therefore there was no appeal to the Court of Criminal Appeal under sect. 20, sub-sect. 2, of the Criminal Appeal Act, which allows an appeal from a "conviction upon a criminal information." In *A.-G.* v. *John Bowman* (1791; 2 Bos. & P. 532 n.), Eyre C.B. declared that an information for keeping false weights was not a criminal proceeding, and therefore evidence as to the character of the defendant was not admissible. In *A.-G.* v. *Radloff* (1854; 10 Ex. 84; 23 L. J. Ex. 240; 2 C. L. R. 1116; 18 Jur. 555; 2 W. R. 566), which was (like this case) an information filed by the Attorney-General for the recovery of penalties for smuggling, the Court of Exchequer were evenly divided upon the question whether it was a criminal proceeding, Pollock C.B. and Parke B. holding that it was, and, therefore, the defendant was not a competent witness on his own behalf, and Martin B. and Platt B. *contra.* Subsequently, in *A.-G.* v. *Bradlaugh* (1885; 14 Q. B. D. at 688; 54 L. J. Q. B. 205; 52 L. T. 589; 33 W. R. 673, C. A.), Brett M.R. expressed his concurrence with Martin B. that an information upon the Revenue side was not a criminal proceeding.

[The Lord Chief Justice: It was never suggested, while I was Attorney-General, that the issue of a writ of attachment against smugglers was a criminal proceeding.]

Sects. 31 and 32 of 28 & 29 Vict. c. 104, the Crown Suits Act, 1865, give a right of appeal from the decision to the Court of Appeal, but it would probably still be a condition of a stay of execution that the penalty imposed must first be deposited in Court. If the Court of Criminal Appeal has jurisdiction there would be two different rights of appeal. It is expressly provided by sect. 259 of the Customs Laws Consolidation Act, 1876, that the defendant may give evidence; this may be some indication that the information was regarded as a criminal proceeding, because otherwise the provision was unnecessary.

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Albert Hausmann, Alfred Moser and Oscar Schmidt.

The Solicitor-General, Sir S. T. Evans, K.C. (with him *Danly*), for the Crown, was not called upon.

The Lord Chief Justice: In this case I had no doubt about the point, but as it was of importance I thought it should be argued. Having heard the authorities we are of opinion that the information to recover penalties for smuggling is not a criminal proceeding, and that this Court has no jurisdiction to entertain the appeal from the sentence. There are certain criminal informations for grave misdemeanours and for libel in which it was provided by sect. 20 of the Criminal Appeal Act that the Court should have jurisdiction, as well as in proceedings by indictment. We agree with Brett M.R. in *A.-G.* v. *Bradlaugh* (above), that proceedings on the Revenue side to recover penalties for smuggling are not criminal proceedings, and therefore they do not come within the jurisdiction of this Court. It almost concludes the matter that there is an appeal in this class of case to the Court of Appeal. The fact that the Customs Laws Consolidation Act, 1876, expressly provided that the defendant might give evidence is no indication that the proceedings were regarded as criminal. Before the passing of that Act there were a number of other cases where statutes expressly allowed the defendant to give evidence in civil proceedings. The information upon which the appellants were sentenced was neither a proceeding by indictment nor a criminal information within the meaning of the Act of 1907, and so the Court has no jurisdiction to entertain the appeal.

Appeals dismissed.

FREDERICK ADOLPHUS RAWLINGS.

Frederick Adolphus Rawlings.

When the words of a verdict are not clear or are confused, but the intention of the jury is plain, the Court will give effect to it, under the proviso to sect. 4 (1) *of the Criminal Appeal Act. Under that proviso it may decline to consider a point of law not taken at the trial.*

This was an appeal against conviction upon points of law. The appellant was indicted with two other men, Burrows and Harper, before Mr. Commissioner Rentoul, at the Central Criminal Court, on the 26th July, 1909, upon three counts, which charged them with (1) inducing one Margaret Smith, by false pretences, to

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Frederick Adolphus Rawlings.

execute an agreement for the possession of certain premises; (2) with obtaining the same; (3) with fraudulently conspiring to obtain from her divers of her goods and chattels by false pretences and to cheat and defraud her thereof. The other two were found guilty upon the whole indictment, but Rawlings only on the third count. On July 30th he was admitted to bail by the full Court on the application of counsel, the Lord Chief Justice stating that the general rule of the Court was not to allow bail pending appeal.

Leycester for the appellant: The question is whether the jury intended to find appellant guilty of any legal offence whatever, the grounds of the appeal being misdirection and coercion of the jury. In November, 1908, Burrows took furnished premises on the first floor of a shop in the Strand from the prosecutor, for the purpose of carrying on an insurance business, on an agreement to pay a monthly rent of 7*l.* 10*s.* He gave as references Harper and appellant, and each of them wrote a letter to the prosecutrix recommending Burrows as a tenant. Burrows remained three months in possession of the premises without paying any rent. Harper was associated with Burrows in business, and there was some evidence that he profited by the transaction. Appellant derived no profit from it, but it was alleged that he fraudulently conspired with the two others to cheat and defraud the prosecutrix, and there was some evidence that he knew that Burrows had not paid rent in his previous tenancy.

The judge in summing up directed the jury that they might find a criminal conspiracy if Burrows in fact obtained possession of the premises through the false references. This was wrong, because to constitute the criminal offence there must have been an intention to defraud, and knowledge on the part of appellant that Burrows intended not to pay the rent. When asked for their verdict, the jury said that in the case of appellant they found him guilty of conspiracy "without fraudulent intent," and they explained this to mean that they found him guilty of conspiracy only, and subsequently guilty of conspiracy with others to get possession of the premises, "but not with a view to avoid payment of rent." Counsel for appellant thereupon asked the judge to enter a verdict of not guilty, but the judge refused, and advised the jury to find whether appellant was guilty of conspiring to help others to defraud.

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20 *August.*
Frederick Adolphus Rawlings.

Upon the third count of the indictment being read to the jury, the foreman replied that they found appellant guilty of conspiring with the others "but without false pretences," and the judge held that that meant a verdict of guilty upon the third count. The jury were practically coerced by the judge, and in view of what took place between their first and last finding, the verdict was too unsatisfactory to be allowed to stand. Moreover, there was never any evidence that any of the prisoners were guilty upon the third count (of conspiring to obtain goods and chattels), on which alone appellant was found guilty. The third count was not supported by the evidence. Prisoners, if they conspired at all, conspired to obtain possession of the premises, and not of goods or chattels. It was not an offence to conspire to obtain possession of premises unless there was an intent to defraud. The intent was of the essence of the crime. *Muirhead*, 1 Cr. App. R. 187; 73 J. P. 31 (1908); *Gray* (1891), 17 Cox C. C. 299; 53 S. J. 164; 25 T. L. R. 88, C. C. R.

Travers Humphreys for the Crown. The judge properly directed the jury upon the law. The jury were really seeking to distinguish between the two counts, finding appellant guilty of conspiracy, but not guilty of false pretences, because he had made no profit out of the transaction. By fraudulent intent they meant false pretences.

Leycester, in reply: The Court could not speculate upon what the jury meant; it is concerned with what the jury said. The jury never appreciated the meaning of the count upon which appellant was convicted.

Darling J.: In this case three men, Burrows, Harper and Rawlings, were indicted together upon an indictment which contained three counts. The other two were convicted upon all three counts, appellant upon the last only. There was considerable discussion in the Court because of the form in which the jury first returned their verdict. [The learned judge stated the circumstances, as above.] There was no question of fraudulent intent, and the jury used these words to distinguish between conspiracy and the other crime charged in the indictment, viz., false pretences. The discussion was very involved, and unless the Court could collect from the early part of it what the jury meant it would not uphold the conviction. But it appears to the Court that the jury under-

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Frederick
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Rawlings.

stood the difference between the counts of conspiracy and false pretences, and, though they used the wrong terms, they were under no misapprehension about the thing. They meant that Rawlings did intend to cheat and defraud, and it was enough to say that on that ground the appeal failed. Another point, however, had been raised, which was not taken either on the trial or in the notice of appeal—that the third count was bad, because what was obtained was not goods, but the use of premises; and it was argued that if the indictment had been simply to obtain the use of goods, it would have been bad. The Court pronounces no opinion whether this point is good or bad, holding that it is its duty to use the power given to it in the proviso to sect. 4, sub-sect. 1, of the Criminal Appeal Act. It considers that no substantial miscarriage of justice has occurred here, and therefore it dismisses the appeal.

Appeal dismissed.

Solicitor for Appellant—*Percy Robinson.*

Charles
Wilson.

CHARLES WILSON.

Severity of sentence.

It is the duty of counsel for the respondent to inform the Court of all details justifying the sentence under appeal.

This was an appeal against sentence, upon leave granted by the Lord Chief Justice.

Appellant was convicted before Hamilton J., at the Manchester Assizes, on July 2nd, of having had unlawful carnal knowledge of a girl under the age of thirteen, and sentenced to twelve years' penal servitude.

Frank Bigham for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The offence was committed upon appellant's stepdaughter in a moment of passion under a sudden impulse. Appellant was unhappy with his wife, and immediately before the outrage had quarrelled with her, and locked her out of the house. He had been drinking hard for the three weeks before the offence, and was under the influence of drink at the time. The Court should consider the degree of responsibility

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Charles Wilson.

when the act was committed. The sentence was too heavy. It was an isolated act, and the appellant had never been convicted before of a criminal offence. He bore a good character, had been in the army sixteen years, and had maintained his step-children under great difficulties for five years.

W. B. Campbell for the respondents, the Society for Prevention of Cruelty to Children, said that he was not instructed to argue that the sentence was not severe.

[The Lord Chief Justice: It is the duty of counsel for the prosecution to say what they think necessary as to the sentence appealed against. If there is anything which the Court should know, it should be brought to its attention.]

There was no evidence that the man was drunk at the time, and the circumstances of his conduct before and after the outrage were against that suggestion.

The Lord Chief Justice: The sentence is undoubtedly severe; but when the judge is not wrong in principle, it is not the practice of this Court to say that the number of years to which the prisoner is sentenced is too great. The Act of 1888 distinguishes the punishment for offences against children under and over thirteen years. When the child is under thirteen the criminal is guilty of a felony (sect. 4), and a sentence of not less than five years must be passed upon him. In this case, the child was entitled to the protection of the man, and taking the most lenient view of the offence it was an act of passion after a quarrel with his wife. The law as regards the protection of children against outrage was not too severe, and the sentence must stand, to date from the date of conviction.

Appeal dismissed.

Solicitor for the Respondents—*W. J. Treharne.*

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Charles Harding.

CHARLES HARDING.

First offence—Severity of sentence.

In sect. 19 *of* 34 *&* 35 *Vict. c.* 112 (*the Prevention of Crimes Act,* 1871), *whether "the preceding period" means the time before "the proceedings are taken," or the time before the receiving charged,* quære.

This was an appeal against sentence, upon leave granted by the Lord Chief Justice, and an application for leave to appeal against conviction (referred to the full Court by the Lord Chief Justice), and to call further evidence. Appellant was convicted before the Chairman at the Middlesex Sessions, on the 7th of August, of receiving three stolen brass locks, and sentenced to eighteen months' imprisonment with hard labour.

J. A. Symmons for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was charged with stealing and also with receiving three brass locks stolen from the automatic machinery at two railway stations at Ealing, the property of the District Railway Company. The locks were stolen at some time between the 10th and 12.15 a.m. on the 11th of July, and on the afternoon of the 11th the appellant was found carrying a bag containing three locks similar to those stolen. Other property of the Great Western Railway of a like nature, which was said to have been stolen between mid-day on the 10th and 5.30 a.m. on the 11th of July, was also found in his possession. The ground of the appeal against conviction was that evidence was improperly admitted against him. The substantial charge against him was of stealing, and evidence as to finding the other property in his possession, which might be given under sect. 19 of the Prevention of Crimes Act, 1871, in a case of receiving, was not admissible in such a case. *Girod* (1906), 70 J. P. 514; 22 T. L. R. 720; C. C. R.; it is stated in the headnote of the former report that, on an indictment for feloniously stealing and receiving, "if the real offence charged is stealing and not receiving," evidence of other stolen property being found in possession ought not to be admitted.

[*Per Curiam:* The headnote, upon which reliance is placed, is

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incorrect (*a*); in any case the fact that the appellant here was convicted of receiving is sufficient indication that there was a substantial charge of receiving, which is not affected by the fact that the Chairman in summing up spoke of "a barefaced robbery."]

Further, the evidence was not admissible, because it was not proved that the property of the Great Western Railway Company was stolen before the property which he was charged with receiving, and the section provides that the property must have been stolen in a preceding period of twelve months. Appellant was entitled to the benefit of the doubt that the other property had been stolen afterwards.

[PHILLIMORE J.: Does not the preceding period mean a period of twelve months before proceedings are taken?]

No, because the point of admitting the evidence is to prove that the stolen property with which he is charged was received with knowledge that it was stolen; and subsequent suspicious conduct would be no evidence of that. Moreover, if that interpretation were accepted, the absurd consequence would follow that evidence of stolen property found in his possession ten years after the offence with which the prisoner is charged might be given against him.

[PHILLIMORE J.: That only shews that the section was badly drawn.]

The sentence was much too severe. It was a first offence, and the man bore a very good record.

(*a*) The headnote in T. L. R. is: "A conviction upon an indictment charging the prisoners with stealing certain articles and receiving them well knowing them to have been stolen, quashed upon the ground that evidence was allowed to go to the jury under sect. 19 of the Prevention of Crimes Act, 1871, of the possession of other property alleged to have been stolen within the preceding twelve months, there being no evidence that the latter property had been stolen."

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J. P. Grain, for the Crown: Both the counsel and solicitor for the Railway Company had thought that the sentence was too severe.

The Lord Chief Justice: Upon the question of conviction there is no substantial ground for granting the application for leave to appeal. The point as to admitting evidence of finding goods stolen subsequently in the receiver's possession may have to be determined in another case; here there was no need to go into it, because it was sufficient for conviction that the appellant was found in possession of the stolen articles and gave an untrue account of how he came by them. But the sentence was too severe for a first offence. The Chairman seems to have taken into consideration the charge of stealing the locks of the Great Western Railway Company. The proper sentence would be nine months' imprisonment with hard labour. As the appellant had been in prison a month before trial, they reduced his sentence to eight months' hard labour, to date from the date of conviction.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE BUCKNILL.

FREDERICK MILES.

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Frederick Miles.

There is no objection in law to trying a prisoner who has been acquitted of larceny, on an indictment, supported by exactly the same evidence of fact, under sect. 7 of 35 & 36 Vict. c. 112 (*the Prevention of Crimes Act*, 1871).

This was an appeal from the order of Mr. Justice Darling, refusing leave to appeal against the conviction, and legal aid; an application for leave to call further evidence, and an appeal on a point of law.

Lawless, for the applicant (under sect. 10 of the Criminal Appeal Act), who was not present. Miles was convicted (on a second indictment) on September 8th, at the County of London Sessions, before Mr. Hedderwick, under sect 7 of the Prevention of Crimes Act, 1871 (35 & 36 Vict. c. 112), of being found in a public place with the intention of committing a felony, viz., that charged in the first indictment, the words of which were pursued *verbatim* in the second; he was sentenced to twelve months' imprisonment with hard labour. Under that section the previous convictions have to be proved to the jury first. On the 25th day of August he was in Mile End New Town in such circumstances as to justify his arrest on these charges. The first indictment was an indictment for stealing in the same place from the person of a person unknown. He was tried before the Chairman, and was acquitted.

Upon the first indictment the whole case depended on the evidence of two little girls. They saw appellant down a lane, and they saw him after that taking money from the pockets of a sailor. The offence was said to be committed at three o'clock in the afternoon. That was the only evidence before the jury. Appellant when arrested said, "You have made a 'bloomer.' I

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was elsewhere at the time " The jury were not satisfied that he took anything out of the sailor's pockets. The verdict of the jury was not guilty. I am, I submit, entitled to assume from that that the jury, not having convicted either of the full offence or an attempt, did not believe the evidence of the girls.

The other indictment, under sect. 7 (above), was tried by the same judge with a different jury. The felony alleged to be contemplated was actually set forth in words pursuing the first indictment. The evidence of fact in this was exactly the same, although the indictment was different and the offence was different; the jury disagreed. Evidence of the previous convictions was given. Then appellant was sent into the other Court and tried again on the second indictment. I submit that this is absolutely opposed to the modern state of the criminal law. (See *Miles* (1890), 24 Q. B. D. 423; 59 L. J. M. C. 56; 62 L. T. 572; 38 W. R. 334; 17 Cox C. C. 9; 54 J. P. 549 (C. C. R.); Hawkins, J., at pp. 430 (24 Q. B. D.), 431 and 432 (foot); and Pollock, B., at p. 436, citing Cockburn, C.J.; see also *King*, (1897) 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329 (C. C. R.). The last paragraph of the head-note in the Law Reports is: "A defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods."

[Darling J.: This, it seems to me, is a case of absolutely different evidence. The jury may have thought that there was not sufficient to convict him either of the full offence or of the minor offence. (His Lordship read the indictment.)]

I am entitled to rely upon this indictment. The jury acquitted upon the first indictment and he was charged before the second jury upon the same evidence.

[The Lord Chief Justice: What you have to satisfy us of is that this verdict is wrong.

Darling J.: Suppose the man had said, I intended to steal, but I did not do it because I had not time. He is entitled to be acquitted.]

Lawless : Surely I am entitled to say that upon the evidence of these two girls, whom the jury disbelieved, the appellant was entitled to be acquitted upon the same set of facts. There was an important discrepancy in the evidence given by the two girls which only the jury noticed. One girl swore that there was no woman at the public-house, and the other said there was. I am here to urge—the evidence of fact being the same in both cases—that this is the crux of the case.

The Lord Chief Justice : This is an application for leave to appeal against a conviction. It has been forcibly urged upon us that if this conviction stands a new principle of the criminal law would be brought into practice, and that grave consequences would ensue. I must point out that it is rather late in the day to say that because there is a charge under the Prevention of Crimes Act every man is to be tried twice for the same offence. The judge has a discretion in such a matter, and if, when a man has been acquitted, he considers the acquittal should make an end of the whole case, he can express his opinion. But it is perfectly plain that in such a case as this, if a jury have given a verdict for one offence, a jury can give a verdict for another offence. It is not to be lost sight of in this case that the new jury in the second case did not agree as to the charge under the statute, and a further jury was empannelled. [His Lordship here read the section of the Act.] I think that the evidence was amply sufficient to justify the verdict. I am quite satisfied that no one will cite this case as one which presses the law against a man unduly. The jury had given a verdict upon an indictment for one offence, viz., for larceny, but there is no rule of law which prohibited his being tried for the different offence under sect. 7 of the Prevention of Crimes Act, 1871. It is impossible to say that there was any objection in law to the trial, and in our opinion there is no ground for allowing an appeal against the decision.

Applications and appeal dismissed.

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Basil
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BASIL BANCROFT.

A promise to do something in the future may imply a representation as to an existing fact which, if false, may be a sufficient false pretence to sustain an indictment.

This was an appeal against a conviction on a point of law; also an appeal from an order of Darling J. refusing leave to appeal on the facts.

Appellant was convicted on August 27th at the County of London Sessions, before the Deputy-Chairman, for obtaining money by false pretences, and was sentenced to nine months' imprisonment in the second division.

Newton Crane for the appellant, who was present: I address myself only to the law in the case. The false pretences were alleged to be made to several tradespeople in the West End of London, in canvassing for advertisements for an annual publication called the *American Red Book.* This was a directory, which was originally published in 1904 or 1905 by the father of the appellant in conjunction with appellant. It is common knowledge that the success of a book of this character depends almost entirely on the advertisements it gets. It contained a list of Americans in London, English firms doing business in America, and American firms doing business in London. It also contained the addresses of Americans in London. Unfortunately difficulties arose between the appellant's father and his mother, and in 1905 a rival publication, the *American Blue Book,* was brought out by the appellant and his mother. That book was published by publishers of position here, and was a financial loss. It was published again in the year 1906 and again in the year 1907, in both of which years there was a loss. The prisoner was absent from this country during the great part of 1908, but returned at the end of that year. He put himself into communication with printers and publishers in London. He started to canvass for advertisements for the book. In the beginning of 1909 he went to four persons in the West End of London and asked them to take spaces in the book, representing that it was about to be published. He undoubtedly represented to them that the book was about to be published

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and he obtained from them money in advance, giving them discount for cash. Some of these people he went to in March, and some in April, and the statement he made to them was that the book was to be published in May. They gave him contracts for advertisements and paid him in advance for them. As a matter of fact, the book was never published, the prisoner being arrested on the 1st of July. There is no other evidence of false representations than what is contained in the evidence of the four persons from whom he obtained the prepaid advertisements. Upon cross-examination this question was put to one of them: "May I ask you once again what is the false pretence or false representation you say Mr. Bancroft made to *you?*" To which she replied: "Both he and his agent told me that the book would be published early in May, which I believed. They told me that everything was in order." The next witness was asked the same question, and made substantially the same reply. The third witness to this question answered: "In saying that my advertisement would be published early in May without fail." The only other witness who had given an advertisement to the prisoner or his agent was unable to say what, if any, false representation was made to her, and appeared not to understand the question. In these circumstances, I submit, there was nothing to go to the jury, and there should have been no conviction.

[The Lord Chief Justice: Was there any evidence as to when the book was to be published?]

There is no evidence of any statements that arrangements had been made regarding the publication of the book.

[The Lord Chief Justice: It is a serious point that must be considered. A book cannot be published in an hour, or in a day, or in a week. A statement that everything is in order for publication at a given time may be of importance.]

If appellant had the intention of publishing the book, he could not have been convicted of obtaining money by false pre-

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tences. The evidence called by the prosecution shewed that he had in fact published a book in 1905, 1906 and 1907, and tried to get the same printers to publish the book in 1909. They declined, as the publication had involved them in a financial loss, although the later editions had reduced the loss on the earlier ones. Upon cross-examination, the witness admitted that all of the printing materials found by the police at appellant's office, and which were used by them as evidence of his guilt, were similar forms to those he had used for soliciting subscribers, and otherwise consisted of information and contracts in the years when the book was brought out, and that his firm would not undertake the production of the book in former years until the prisoner had lodged with the firm signed contracts for advertising, which they regarded as collateral security for the risk the firm was taking in printing the book.

There is the evidence of a witness, Carr, called by the police, who spoke to the fact that appellant had tried to enter into negotiations with his firm for the publication; there is the printing matter found at appellant's office, and there is the material fact that he obtained contracts upon which no money was paid in advance, all tending to shew that he was contemplating bringing the book out. All these things shewed that the business which the prisoner was conducting was an honest business.

[Darling J.: Suppose he had the intention to publish the book, suppose he falsely represented to the persons named that all was in order, that the book was to be published, was he not rightly convicted? It is not necessary to say that he intended to publish the book. Suppose I say my rent is due, and I want the money to pay it and get it from somebody. No rent is due, and the money is not got for that purpose. Surely I can be convicted?]

A book of this kind could not very well be published at once. Evidence was called to the effect that two publishers had been called upon by appellant with the object of publishing the book. The statement that the book is ready might be put in the class of cases known as "puffing."

It was said only as a means to put pressure on advertisers to get them to sign contracts. These are the general grounds. The very fact that he got these people to subscribe in previous years is in his favour. His statement simply amounted to this, that he was getting up a book, and expected to be able to publish it in May. The judge ought to have stopped the case. He cited *Speed* (1882), 15 Cox C. C. 24; 46 L. T. 174; 46 J. P. 451; C. C. R., and *Gordon* (1889), 23 Q. B. D. 354; 58 L. J. M. C. 117; 60 L. T. 872; 16 Cox C. C. 662; 63 J. P. 807; C. C. R. In the former case there was no such person as Warrender. Prisoner said that Warrender had combined with him as to the publication. I do not think that here time was of the essence of the contract. It seems to me contrary to every authority I can find, that where there is any direct proof of the absence of a statement of intention, defendant should be convicted.

[The Lord Chief Justice: Was there any evidence that this money was used to pay for the expenses of the book?]

No.

[The Lord Chief Justice: Suppose a man says at the end of April "I am going to publish a book in May," having at that time made no arrangements, and in fact having no intention of making any arrangements. Do you say that that is a representation of future facts for which he cannot be indicted?]

I cannot say that if he had no intention at all of publishing the book he could not be convicted. There is evidence, further, of the fact that the previous books had never been published until he had gone round canvassing for subscriptions. There were witnesses called by appellant shewing he was negotiating for publication for three or four months. I submit that there was evidence of the fact that there was an intention to bring this book out. The evidence of arrangements with printers proves this. (See *Gordon*, 23 Q. B. D. 354.) There was here no false representation of an existing fact.

[The Lord Chief Justice: A promise to obtain a thing in future may involve a statement that the promisor can do a particular thing, as well as that he will do it.]

I hardly know where the line is between that class of cases and this particular case. If he had gone to one of these milliners, and one of these milliners had said she wanted her advertisement to appear in May, and the book did not come out until July, I do not think he could have been convicted, although she might have had a civil action for damages against him. If the book was in existence, advertisements could not be put in it, and the fact that advertisers consented to give advertisements to appear in a forthcoming publication shews there was a representation as to future conduct, and not a false representation of an existing fact.

J. A. Symmons, for the Crown, was not called upon.

The Lord Chief Justice: It is contended that if this man was *bonâ fide* getting advertisements at the time he was collecting the money with the *bonâ fide* intention of bringing out the book, perhaps not exactly in May, but some time later, and was taking steps to do that, he ought not to have been convicted. That was for the jury. I cannot imagine a fairer direction in favour of the prisoner than was given. It is argued that there was nothing more than an expectation or hope alleged, and that the statement was only a representation of a future fact. In the concluding words of the summing-up the exact point is dealt with. Mr. Loveland-Loveland said this:—"Did he at the time he was collecting that money *bonâ fide* intend to bring out this? If you think all this points to his intending to bring it out, by all means say so, and find him not guilty." I cannot imagine a fairer direction than that. Mr. Crane has raised the point that a statement as to a future fact was not a representation of an existing state of things, and therefore was not a false pretence. I cannot do better than read the summary of the law on the subject as given at page 600 of the last (23rd) edition of Archbold's Criminal Pleading: "A promise to do a thing *in futuro* may involve a false pretence that the promiser has the power to do that thing, for which false pretence the promisor may be indictable." Now in view of that principle, let us look at some of the incidents of the false pretences proved. One witness, when asked "What do you say was a false statement?" answered, "That the book was going to be published early in May." Again: "Did he say when it was going to be published?" Answer: "In the middle of May." Another answer was, "In saying my advertisement was to be published in May." Again, "Both he (the appellant) and his agent told me that the book would be published early in May, which I believed." Other witnesses gave evidence to the same effect. In these circumstances it was for the jury to say whether it was a statement made of an existing state of facts that he intended to get it published in May, and that the thing was in order for publication in May, and the jury have answered that question against the appellant. I regret to say that this young man has been going about obtaining money from these people on statements which he knew to be fraudulent. The appeal must be dismissed. The conviction may date from the 17th of September.

Appeal and application dismissed.

Solicitor for the Appellant: *H. G. Burgess.*

CHARLES GURRAN AND JOHN TAYLOR.

Charles
Gurran
and
John Taylor.

Severity of sentence.

Appellants were convicted with three other men on September 11th, 1909, after three days' trial, at the Central Criminal Court, before the Recorder, on a charge of shop-breaking. Gurran had previous convictions for felony. Taylor had nine previous convictions for various offences. Gurran was sentenced to eight years' penal servitude, and Taylor to ten years. Leave to appeal against

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Charles Gurran and John Taylor.

conviction and sentence had been refused to the former, and against sentence to the latter, by Mr. Justice Darling.

The robbery took place at Messrs. Mappin & Webb's shop in the City on August 28th last.

Turrell, for Gurran, who was present: As to the conviction, the trial was unsatisfactory. The jury must have inferred that Gurran was a man of bad character. First, because Knight, a fellow prisoner, called witnesses to character, and Gurran was unable to do so. Secondly, because the Recorder asked the Metropolitan Police officer whether he had known Gurran before, and how long he had known him; and the officer stated he had known him for six years. The Recorder was wrong in suggesting to the jury that Baker, a man with whom Gurran said he had an appointment, was non-existent. Gurran's character was none of the best, and a person with whom Gurran was acquainted might naturally have an antipathy to the Old Bailey, and a not unreasonable objection to meeting detectives. The inference was not a reasonable one, and it certainly was not the only inference to be drawn that Baker was non-existent.

[The LORD CHIEF JUSTICE: What was the value of the jewellery stolen?]

About 40,000*l.* or 43,000*l.*, but all was recovered. The Recorder only made a distinction in the sentences of two years. One of the other prisoners admitted that he was the person responsible for the violence. He was the man of courage, who was there to carry out the robbery. With regard to Gurran, the class of crime that he has been guilty of is very different to the crime charged here. Down to 1900 he had a clean record. Russell is a man with a very different career from Gurran. The prisoner is only forty-four years of age. He takes in this case a very subordinate part—he merely watched outside. This man is not a habitual and a dangerous criminal, and I submit that the difference of two years was not a sufficient deduction. He is a poor, mean sort of thief, probably dragged into this class of crime by one of the other prisoners, and he has got the punishment of a clever and experienced criminal. What he did, did not involve any daring. In these circumstances I submit the sentence imposed was excessive.

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Beyfus, for Taylor, who was not present: What weighed most with the learned Recorder was the violence of the assault. To that my client pleaded not guilty, and he was not tried for it. If he had been, I should have been in a position to prove that my client had nothing to do with the assault. The watchman said that when he looked up he only saw two men, and was immediately assaulted and gagged. The gag was eventually removed. Appellant pleaded guilty to breaking and entering the shop, but to the offence of feloniously wounding he pleaded not guilty. I can only urge that his case as regards the assault was not the same as that of the other men inside, and although he may have been legally guilty I should have been able to prove that his moral guilt was very much less. I must admit that there is a long list of convictions. His longest sentence was eighteen months' imprisonment. It is entirely improbable that he was in any way the leader in this crime. The prisoner, although he was inside the premises, had taken no part in the assault on the watchman, and his previous convictions were, as I have said, for offences of a very different class from this. I submit that the sentence is excessive.

The Lord Chief Justice: There is no ground for giving leave to appeal from the conviction, and we see no grounds for reducing the sentences. It is important to notice that this attempt was very nearly successful, and would have been entirely successful had it not been for the acumen of a cabman, whose suspicions being aroused, went for the police. As to the sentence upon Gurran, it was no doubt severe, but he had a very bad record. Many of his previous crimes were, no doubt, of a very different character, but at the same time there were convictions extending practically continuously from 1900 to 1909. Having regard to the nature and character of the offence, and the man's past history, it could not be said that the sentence was excessive. The fact that he was outside does not of necessity diminish his guilt. He evidently was quite prepared to assist in a robbery in which very valuable property was concerned. He was sentenced to eight years' penal servitude, and in view of his previous convictions we do not think the sentence is too severe. As regards Taylor, his counsel is instructed to say that one of the other convicted men took upon himself the chief burden of the crime. If a man is gagged,

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it is not probable that it has been done by one person only. Now, Taylor was inside, and counsel is not instructed to say that he had nothing to do with it. It is suggested that he was only suspected of the violence. Quite apart from that, having regard to the fact that Taylor was inside, and was one of the four who actually committed this crime, I think the Recorder was quite right in passing a severe sentence upon him. These appeals are therefore dismissed.

Applications dismissed.

Solicitors for Appellants: *Walton & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE BUCKNILL.

PATRICK MORAN.

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Patrick Moran.

The defence of an alibi *ought to be set up at the earliest possible moment, and ought to include a statement where the defendant was at the time charged.*

This was an appeal from an order of Bray J., refusing leave to appeal against conviction, and also an application for leave to call further evidence.

The applicant was convicted at Leeds City Quarter Sessions on the 29th September, 1909, before the Recorder, for housebreaking, on December 3, 1908, at Leeds, and was sentenced to nine months' imprisonment with hard labour.

G. E. C. Yarborough for the applicant (under sect. 10 of the Criminal Appeal Act), who was not present. The housebreaking took place on December 3, 1908, and there were three men engaged in it, and the third man escaped. The police say that the third man was Patrick Moran, and his defence is an *alibi*. He says he was not there at all. The prisoner at the trial went into the witness box and gave evidence, and he desires to call the other two prisoners to say he was not there at all that night. The offence was committed at Leeds, and the prisoner says he was at Goole. He asks that the lodging-house keeper, Craven, with whom he says he was living at the time, should be brought as a witness, and also a man called Jones, who worked with him at Goole. The reason that the prisoner did not call these men at Leeds was that he says he was taken by surprise. He had seen the other two prisoners, and they had promised to come. He

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thought the sessions were not until October. He was unable to obtain the address of the man Jones for some considerable time. He has taken great pains to get his address, and he has now got it. (Counsel referred to the evidence of the policemen.) It must be admitted that the evidence of identity is very strong indeed.

[The LORD CHIEF JUSTICE: He had, at the police court, a full opportunity of saying where he was. It is very unfortunate that he kept back this *alibi* until the trial.]

With regard to the question of identity, the first policeman says he actually flashed a lamp in his face, and recognized him. But there is some discrepancy between the evidence of the policemen as to what the night was like. One of the policemen said it was a dark night, and foggy. Another of the policemen, on the other hand, said he could see a hundred yards, as it was a clear and fine night.

The LORD CHIEF JUSTICE: In our opinion this application fails. The prisoner desires to call witnesses to prove an *alibi*. There was strong evidence of identification. The case was most properly left to the jury, and they were told that if they had any doubt they ought to give the prisoner the benefit of it. If prisoners are going to set up a genuine *alibi* they endeavour to get their witnesses at the right time; and sometimes, if necessary, they will be allowed to re-open the case. In this case, when applicant was before the magistrate, he said: "I know nothing about it at all. I am sure the constables are wrong. I was away at the time it was done." Now, if he had gone on to say at the police court that he had been in a certain place, the police would have investigated the case. In these circumstances, it is impossible to re-open the case. The application must therefore be dismissed.

Application dismissed.

JOHN CONNOLLY—JAMES FREDERICK COSTELLO.

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22 *October.*

John Connolly
and
James
Frederick
Costello.

Where two persons are indicted for conspiracy, it is not sufficient evidence of an overt act that one parted with a document which is ultimately found in the possession of the other.

In sects. 2, 3 *of the Servants' Characters Act*, 1792 (32 *Geo.* 3, c. 56), *the words "knowingly and wilfully pretend or falsely assert in writing" express two distinct offences, and the words "in writing" do not apply to the word "pretend."*

A conspiracy laid in an indictment as one to violate a specified statute which is aimed at particular frauds, is not necessarily a conspiracy to defraud within sect. 29 *of the Criminal Procedure Act*, 1851 (14 *&* 15 *Vict.* c. 100), *so as to render the offender liable to hard labour.*

Sentence—Where concurrent sentences have been passed on more than one indictment, the Court, on quashing one conviction, does not necessarily reduce the sentence.

Appellants were tried on September 14th and 15th at the Central Criminal Court before the Recorder, Connolly on one indictment for larceny (not here relevant), and on another jointly with Costello for conspiracy to obtain a situation for him (Connolly by means of a false character, Costello also on another indictment jointly with a Mrs Bishop for conspiring to commit an offence against sect. 2 of the Servants' Characters Act, 1792 (32 Geo. 3, c. 56). All three were convicted on the respective indictments, and concurrent sentences were passed severally, viz., twenty months' imprisonment with hard labour on Connolly, and eighteen on Costello. Their application for leave to appeal against conviction and sentence was referred by Darling J.—as to the indictment for a conspiracy between them only—to the full Court, which, on October 15th, gave leave. The Court now allowed a point of law on the case against Costello and Bishop to be argued.

F. Watt for the appellants (under sect. 10 of the Criminal Appeal Act), who were present. Appellants were undefended at the trial.

The point in this case is simply this. Mr. Stansfield, a publican, had, on July 26th, answered an advertisement by a barman by a postcard which was addressed to a man called "F." That advertisement was inserted by Costello, and he received this postcard. The other prisoner, Connolly, presented himself the same evening at Stansfield's public-house. Beyond the fact that Connolly had received the postcard there was no evidence of conspiracy. Costello had a fellow-lodger, named Davies, and asked Davies to take in letters for him, and the answers were sent to Davies in the Kingsland Road. All this implied nothing fraudulent at all.

What does Costello do when he gets the advertisement from Davies? The situation contained in it did not suit him. He met that very same day a man called Cole. Cole, he said, ought to apply for it, as he (Cole) was out of a situation, and thereupon he handed over the postcard to Cole, and as far as the evidence goes Costello disappears from the scene. There is nothing fraudulent whatever in the handing over of the postcard to Cole. He did not mean Cole to say "I am F." Costello meant that Cole should apply for the situation as a barman in his own name. Cole's evidence was: I know Costello and I don't know Connolly at all, and he explained that these were the circumstances in which he had received the card.

For some reason or other Cole did not use the card himself. These postcards were passed about (as it was put at the trial) like negotiable instruments. Then we find Cole passing this card to an unknown man. That, again, is no evidence of conspiracy. If Cole's evidence is accepted, the suggestion of conspiracy disappears altogether.

[DARLING J.: Are you not labouring all this rather? If I give something to a friend to mind, and he himself goes and gives it to a third person, do you think it is possible to lay down that thereby the third person is a conspirator with me?]

No, certainly not. A great deal was made at the trial of the fact that when the detective went to arrest Costello, he jumped out of the window. There was a dispute as to the height of the window. The detective says it was sixteen feet high. Costello said it was eight. But this point was a mere matter of prejudice.

There is another point, namely, with reference to the charge against Costello and Mrs. Bishop. He had actually been in her service. It was charged that they had conspired together that

Mrs. Bishop should give Costello a false character; the indictment was a very long one, and every count was laid under sect. 2 of the Characters of Servants Act, 1792. The relevant words are, ". . . . if any person . . . . shall knowingly and wilfully pretend or falsely assert in writing. . . ." (Revised Statutes, 2nd edition.)

Mrs. Bishop wrote nothing, and if there was no written character it is perfectly certain that Bishop had not committed any offence. And indeed the only offence under the Act that Costello could have committed was (under sect. 4) in saying that he had been in an employment in which he had not been. But it was admitted that he had been in Mrs. Bishop's employment. Therefore he had committed no offence against the Act. Sect. 4 says, ". . . . if any person shall offer himself or herself as a servant, asserting or pretending that he or she hath served in any service in which such servant shall not actually have served. . . ."

[The LORD CHIEF JUSTICE: What was the allegation of conspiracy in the indictment between Costello and Bishop?]

Giving Costello a false character for honesty, sobriety, &c. and as to the length of time he had been in her service.

[The LORD CHIEF JUSTICE: Would not the fact of giving a false character be a conspiracy, independently of the Act altogether?]

Yes, but here the indictment is only under the Act. If you conspire to commit an offence under s. 2 of the statute of George III., that only refers to written matter, which was not the case here.

[The LORD CHIEF JUSTICE: Supposing there is simply a conspiracy between two people—"Will you let me say I have been in your service two years and am truly respectable?" and this was quite untrue, would not this be a conspiracy at common law? Did they allege that the offence was against the statute?]

Yes, but they were not charged with such a conspiracy, but

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with a conspiracy to violate the Act, which they could not have violated if they had succeeded. Further, the Recorder put the whole case as a conspiracy to violate the Act. Then as to the sentence. If it is a common law conspiracy, can hard labour be inflicted? This is not "a conspiracy to cheat or defraud" within sect. 29 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100). Another question is whether, in the circumstances, the sentences were not very severe. Costello had never been convicted before; Connolly had only been convicted once before, some time ago.

Bodkin, for the Crown: With regard to the first question, the facts appear to be these; the advertisement, signed F., 313, Kingsland Road, appeared in the paper on the morning of July 26th. Mr. Stansfield saw it in the paper on that day, and he at once wrote the postcard in question, and in it he stated the qualifications that he required. It is beyond question that the postcard reached Davies' house about two o'clock the same day, and it passed into Costello's possession then or thereabouts with other letters. Then comes the evidence of Cole, who takes up the story, and it is to the effect that he met Costello in the afternoon of that day, the 26th July, and that they were in each other's company for a little while. Cole then walked to Fleet Street alone. Cole said that while he was at the office of the *Morning Advertiser*, in Fleet Street, he gave the postcard to a man whom he did not know. It had been previously asserted by Connolly that he had got the postcard about 5 p.m. in the Uxbridge Road from a man named Rogers, who was supposed to live at Brixton.

[The LORD CHIEF JUSTICE: Why did Cole get the card from Costello?]

The latter said he did not want the situation. He got, in all, four answers, and he handed three of them over to Cole. Therefore Connolly, being in possession of the postcard, appeared—and this is an important matter—in the afternoon of that day at Mr. Stansfield's public-house, and pretended then to be a man called Fryer, who was an actual individual in a situation; the name corresponded with the "F." of Costello's advertisement. Connolly said he had heard of Fryer from Rogers. It was properly put to the jury that the evidence of Mr. Stansfield was that Connolly appeared in the name of Fryer in the afternoon. This was the whole story, and the jury must have either believed it, in which case there was no conspiracy, or they disbelieved it.

[The Lord Chief Justice: What do you say was the evidence that Connolly and Costello had ever met in the matter?]

The submission to the jury was this, that if a thing is done by one man, and very soon afterwards another man adopts the name of the first man, or a name not his own, *e.g.*, pretends to be Fryer, if the second man acts immediately in consequence of what the first man does, the jury may infer there is some agreement between them.

[The Lord Chief Justice: You have the fact that Connolly used the card some short time afterwards.]

If the jury rejected the "intermediate assignment" of the postcard, how else could that postcard have got into his possession except from Costello?

[The Lord Chief Justice: We will assume the story about Rogers to be a lie invented by Connolly. What was there further from which the jury ought to infer that Costello and Connolly conspired, except that the postcard is found in the latter's possession?]

If the jury rejected any evidence as regards the assignment of the postcard, the jury are entitled to infer that Connolly got the postcard from a man he met after two o'clock, *i.e.*, Costello. The jury are entitled to infer this.

[The Lord Chief Justice: Supposing it is a question of the possession of stolen property. Costello has got it at two o'clock; Connolly has got it at five o'clock. Would that be any evidence of conspiracy between Connolly and Costello?]

If it is the possession of stolen property shortly after the larceny of it, that might be so.

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[The Lord Chief Justice: Did the Recorder leave this question of conspiracy to the jury?]

He very clearly pointed out to the jury that there were only two persons concerned, and if they had any doubt upon the question as to whether these two conspired together, they were to acquit.

[The Lord Chief Justice: Supposing that we were to assume that Connolly must have got it from Costello, would that be evidence of conspiracy?]

It would be some evidence of conspiracy. If Costello had handed it over that he should use it, it is plain that that would be some evidence to go to the jury. I submit that the jury must have disbelieved the story of Cole, and the story of Connolly with regard to Rogers.

[Darling J.: These postcards are, it was said, handed about just like umbrellas. Supposing I go to a club and take an umbrella, and another person steals that very umbrella from another club to which I afterwards go, what evidence would that be of a conspiracy between the two of us?]

I do not think in that case there would be evidence of conspiracy. Neither Connolly nor Costello had ever breathed a word in regard to the handing over of the postcard before the trial was half-way through. They never mentioned Rogers or Cole until the trial was well advanced. Cole was brought there to support this theory. The prisoners said that they had been prevented from speaking before the magistrate. The learned Recorder said that he disbelieved this story of their being prevented. I submit there was some evidence before the jury which would shew that there was conspiracy between these two men. The question of the times was a very important matter for the jury to consider.

In conspiracy, undoubtedly it is unusual to give direct evidence of an actual conspiracy—the offence is proved generally from overt acts shewing concerted action. I admit that Mr. Watt is right in saying that if the conviction against Costello be quashed I think that there would be great difficulty in saying that the sentence could lawfully be one of hard labour. In regard to the point under the Characters of Servants Act, there have been several trials for conspiring to commit breaches of that statute in which no writing appears. Under sect. 2 of the statute I submit that there need not be writing; for "knowingly and wilfully pretend" there is a distinct offence from "falsely assert in writing." They were charged under sect. 2 of the statute. The first three counts of the indictment charged general conspiracy to give a false character. Then the subsequent counts refer to the six or seven licensed victuallers who were victimised. These charges are brought under sects. 2 and 3. Some attention was paid to the words of the preamble: "Whereas many false and counterfeit characters of servants have either been given personally or in writing . . ." From that I think it is clear that not only written statements, but verbal or "personal" statements are contemplated by the statute. One of Connolly's reasons for appealing here is that half the barmen in London are serving under false names and false references. I submit that the word "pretend" in this statute has the same meaning as in the offence of obtaining by false "pretences."

[Darling J.: Has the point ever been taken that the offence must be one of asserting in writing?]

Not to my knowledge. I submit that writing is not necessary. I may refer to the "cap and gown" case (*Barnard*, (1837) 7 C. & P. 784). There a person put on the cap and gown of an undergraduate in order to pretend that he was one. A person may "pretend," then, otherwise than in writing. That might be as to sects. 2 and 3, but it would not apply to offences under sects. 4 or 5 of the statute. The preamble of the statute clearly contemplates "personal" representations. The mischief aimed at by the statute is just as great, whether the statements are verbal or in writing. As the section is printed here—in some editions—a comma comes after the word "pretend."

Watt, in reply: I submit, with regard to sect. 2 of the Act, that writing is essential. It has been argued that in the preamble certain offences are contemplated which do not involve writing. It is quite possible to commit an offence under the first section of the statute, and yet not to write anything at all. In the second section it must be "wilfully pretend in writing." If it was meant

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to be both "personally or in writing" in the second section (as well as in sect. 1), why did it not say so? Here the first and the second sections differ. The third section uses exactly the same phrases as the second. When it comes to the fourth section, here again is an offence which can be committed verbally. The words "in writing" are omitted. The offence can be committed either in writing or without writing. With regard to the second section, then, there is no reason why the words "in writing" should be put in there, unless they were intended to qualify all the offences here mentioned.

DARLING J: In this case these two appellants, Connolly and Costello, were indicted for various offences. They were charged with conspiring to obtain a situation for Connolly by means of a false character. Now, Connolly and Costello, it is clear, as far as the evidence goes, never met, or never knew each other, and what happened was that Costello had been advertising for a place in a public-house, and had received answers to his advertisements. One he did not want, and he handed it away. There is no evidence that he handed it direct to Connolly. One Cole, who got possession of it, it seems, handed it about. Upon this, it may either be suspected that Costello, when he parted with it, certainly knew that it was going to be immediately used, or it may very well be that when Costello parted with it he did so innocently. There is nothing upon the evidence to shew that Costello contemplated anything else. The case has not been put higher than this, that very soon after Costello got this card, it got into the hands of Connolly, and Connolly was using it for dishonest purposes. It is true that conspiracy is very seldom proved by a witness who says that he saw people conspiring. If certain things have been done by two people, and if it has been proved that they have been acting together, in that case that might amount to a conspiracy, and a conspiracy might thereby be proved. There is nothing to shew that Connolly and Costello ever met or communicated. We have come to the conclusion that there was really no evidence to be left to the jury that Connolly and Costello conspired. Therefore they are entitled to a verdict of acquittal as regards conspiracy.

There remains the case of Costello and Mrs. Bishop, who were charged with conspiring to commit certain offences against the statute—the Characters of Servants Act. They were both convicted, and it appears that they did conspire to give a false character with regard to Costello. He had been in her employment from time to time, but not for the period stated in her character, and he was falsely pretending that he had been there at a time when he had not been there. The point taken is that she never gave any false character or certificate "in writing," and that therefore this Act is not broken, inasmuch as the false pretence or assertion must be made in writing, and that, consequently, the evidence did not shew a conspiracy to commit an offence against sect. 2 of the statute. The preamble of the statute is important, and is in the following terms:—

[Here his Lordship read the preamble, and also the second section of the Act, as above.]

In the edition before me there is a comma after "pretend" in sect. 2, though not in sect. 3; thus "to wilfully pretend," and to "falsely assert in writing," are two different offences. It appears to us that, having regard to the preamble and to the wording of all these sections, that the statute intended to create two separate offences—one, the offence of knowingly and wilfully pretending; and the other that of falsely asserting these things in writing—that a servant had been in an employment a certain time, contrary to the truth. And we think that there may be a false pretence either by making statements by word of mouth or by writing, and, by way of analogy, by conduct, as if, for instance, a person were to dress up in the well-known livery of a certain person for fraudulent purposes, although he said nothing. At the date of the Act a livery was very much commoner than it is now, and not so many servants could write, as can now. We have come to the conclusion that these two offences are created by the statute, and that there was plenty of evidence here that Bishop and Costello conspired to commit the offence of falsely pretending that Costello had been in her service for a period in which he had not been, and that there was something illegal done under the statute, and that therefore the conviction was right. Costello was sentenced to eighteen months' imprisonment with hard labour. Now, it appears that, as far as this statute is concerned, this hard labour could be imposed. But under this indictment the inflicting of hard labour could not be justified. We think it must go. No doubt the sentence of eighteen months was arrived at by taking into consideration that Costello was guilty of conspiring with both Connolly and Bishop. We think the sentence on Costello should be reduced from eighteen months' imprisonment with hard labour to twelve months' without hard labour, to run from the date of conviction.

Conviction (for conspiracy between appellants) quashed.
Sentence on one appellant reduced.

JOHN POOLMAN.

It is not a misdirection to tell a jury that if a person found in possession of recently stolen property cannot give a satisfactory explanation of his possession, they are bound in law to convict.

Appellant was convicted at the County of London Sessions, on 30th August, of stealing and receiving a coil of wire, the property of the Great Eastern Railway Company, and was sentenced by the Deputy-Chairman to six months' imprisonment in the second division. Leave to appeal for an extension of time, against conviction, and for legal aid had been refused by Darling J., but on October 15th the full Court, on the application of *Roome*, granted leave to appeal against conviction, to call two witnesses named Lock and Watts, and allowed legal aid (solicitor and counsel); and also granted appellant bail in his own recognizance of 25*l*. The delay in appealing was due, it was explained, to appellant's having waited to receive the answer to a petition he had presented to the Home Office; the petition was unsuccessful. He was undefended at the trial, and had failed to give evidence of his twelve years' good character, and he made no attempt to cross-examine the witnesses for the prosecution.

Roome for the appellant (under sect. 10 of the Criminal Appeal Act), who was on bail. On August 10th appellant was with his trolley at Bishopsgate Goods Station, and with the assistance of some porters he loaded the trolley with 16 cases from Arch 59.

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After loading he went away for a short time to sign for his pass out. During his absence a coil of wire, weighing 84 lbs. (which came from Arch 63), was found in his trolley, and his case was that during those few minutes the coil of wire was placed by some unknown person in the trolley and covered up with sacks. When he drove on in due course he was followed by a detective, who swore that during the journey he saw appellant lift the wire from one side of the trolley to the other, but that his view of appellant was suddenly obscured by the traffic. This was the only evidence of guilty knowledge, as immediately after this the detective arrested him. Counsel contended that the detective's story was incredible, because as appellant was driving he would only have one hand free, and could not with one hand lift 84 lb. (coil produced). The case must stand or fall by this detective's evidence. Appellant on his arrest denied all knowledge of the wire. Counsel asked leave to cross-examine this witness.

The Court thought that counsel was not entitled to cross-examine this witness.

Counsel then asked leave to call appellant, but the Court refused the application.

Counsel explained that the witness (Watts) whom he had leave to call—to prove that during appellant's absence from the yard he saw a man interfering with his trolley—was ill in hospital. He was allowed to call

William Lock, a carman in the same employment, who deposed that he was with appellant in the yard on August 10th, and that appellant was absent from his trolley about twenty minutes.

Counsel suggested that he should call appellant's solicitor, who, he believed, had taken Watts's proof.

H. H. Olley, appellant's solicitor, was called, but as it appeared that he had not himself taken Watts's proof in the hospital, the proof was not read.

Roome: I complain also of misdirection. The jury were told that if appellant had given a "reasonable explanation" of his being found in possession of the wire, they must acquit, but "if he has not, then the law says you must find him guilty of receiving this property, knowing it to have been stolen." I submit that this is a perversion of the law: the proper direction was that possession of property recently stolen merely affords evidence from which the jury may infer that appellant stole it, and raises no

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presumption of law. The direction in the text throws upon appellant the burden of proving his innocence. See *Langmead*, L. & C. 427; 10 L. T. 350; 9 Cox C. C. 464; C.C.R. (1864), where it was held: "It is a presumption of fact and not an implication of law from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing or of feloniously receiving has been committed." *Yend*, 6 C. & P. 176 (1833), was also cited.

J. P. Grain, for the respondents (the Great Eastern Railway Company): My submission is that the whole of the summing-up was right. The facts were very shortly these. This man came to fetch sixteen cases in his van from the Goods Station. He had his way-bill from his master, who gave him a very excellent character, and in going out he passed the gate-keeper, and if he had had anything he would have had to declare it. There was a man of the name of Turner called, and gave evidence in detail where the vans were to go in the yard. Appellant stopped opposite the arch where the wire was stored, and he said that cases were handed to appellant, who was the sole person on the trolley. Turner was waiting to get his load, and when appellant went to an office to get what is called his pass out, Turner then felt the coil of wire, which was already on the trolley. They had their suspicions by this time. While he was away, Turner and other porters looked into the trolley and saw the coil of wire. Fowler, a detective, followed him along Bishopsgate Street and Gracechurch Street into the Borough, and communicated with a policeman there. Fowler said he saw him sit on the coil of wire. On that evidence he was taken into custody by the metropolitan officer.

BUCKNILL J.: There was evidence to justify the verdict in this case, and there was, further, no misdirection. The facts as alleged and proved have been very clearly stated. Appellant had been told by his master to go to the Great Eastern Railway and fetch sixteen cases. He had his way-bill for that purpose; he used it. He took with him a vehicle, and stopped it at the top of archway 63. There the coils of wire had been stored. Stock of these had been taken on the 6th of August, and this was then there. He was then seen for some time by one witness standing on the ground, who told him he had to go to archway 59 for the cases mentioned in his way-bill. There were, admittedly, on his trolley sacks or

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a tarpaulin; and the next place the trolley went to was number 59. Evidence was given by two men that while he loaded sixteen cases on the trolley from the ground he was the only person on the trolley. He then went to an office to get his papers signed. It is true that one of the witnesses said he was only away three minutes. While he was away his trolley was looked at, and the sacks were slit, and under them was found this coil of copper wire. It was replaced; and when he returned he drove the trolley off to his master's place, and when he reached the Borough he was arrested as a suspected person. Whilst he was passing from the north side of the Thames, he was seen by the man who was following him to move this coil of wire to where he was sitting. Appellant says that he only leant over to the off-side to get his whip. Appellant was found to be in possession of goods recently stolen. The question is whether there was sufficient evidence to convict him. The Court is of opinion that there was sufficient evidence. There was no misdirection in the summing-up of the learned judge. Therefore this appeal must be dismissed. The sentence is to run from the date of the conviction.

Appeal dismissed.

Solicitor for Appellant: *H. H. Olley.*

Solicitor for Respondents: *The Solicitor of the Great Eastern Railway.*

ARTHUR BELCHER.

Arthur Belcher.

Severity of sentence.

This was an appeal from an order of Mr. Justice Bray refusing legal aid, an appeal against sentence by leave of Mr. Justice Bray, and an application for leave to call further evidence.

Appellant pleaded guilty at Middlesex Sessions, on the 25th September, 1909, before the Chairman, of the larceny of a horse, and was sentenced to seven years' penal servitude and three years' police supervision. He appeared in person.

F. Watt, for the Crown, stated appellant's previous convictions.

The Lord Chief Justice: This appellant has been convicted eight or ten times of larceny, and also of obtaining by false pretences and of horse stealing. He had had various sentences, among them being six months', eight months', twelve months' imprisonment with hard labour, and three years' penal servitude. In these circumstances it seems to us it is impossible to say that the sentence was too severe. Some question may arise in other cases as to taking into consideration other crimes admitted by a prisoner, but that question does not arise in this case. The Chairman's report was that he did not take into consideration the other cases.

Appeal and applications dismissed.

CHARLES SMITH.

Preventive Detention—Sect. 11 *of the Prevention of Crime Act,* 1908 (8 *Edw. VII.* c. 59)—*The Court will, on the hearing of an appeal under this section, hear an appeal against the primary sentence.*

In sect. 10 *the words "a crime committed after the passing of this Act" refer to the date of the Royal Assent* (*Dec.* 21, 1908) *and not to the coming into operation of the Act* (*Aug.* 1, 1909, *by sect.* 19 (2)), *so that persons convicted of crimes committed between those two dates may be liable to preventive detention.*

In an indictment under sect. 10 *it is not necessary as a matter of strict law to aver that prisoner is a habitual criminal, but as a matter of pleading it is better to do so.*

Sentence—In passing sentence, any unexpired sentence should be taken into account.

Appellant was convicted on Oct. 7, 1909, at the Croydon Borough Sessions, of housebreaking, and sentenced to five years' penal servitude, and, under the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), to seven years' preventive detention. He appealed against the latter term, and applied, by leave of Bray J., for leave to appeal against the former.

F. O. Robinson for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, raised the preliminary question whether leave was required to appeal as to the former term. Sect. 11 of the Prevention of Crime Act is: "A person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal." That must mean the whole of the sentence, and not part of the sentence.

[DARLING J.: Ought not the Court to be able to deal with the whole matter, and regulate the practice as regards appealing against the period of the sentence?]

Otherwise it might involve two appeals in this Court. The Act speaks about "a sentence," and "a further sentence," *e.g.*, sect. 10, and similar language occurs in sect. 13. That language is, to a certain extent, against this contention. But although there are, in a sense, two sentences passed, there is really only one sentence, although the two parts of it are served in different ways.

W. B. Campbell, for the Crown: It may be convenient for the Court to take the view that both the sentences in sect. 11 are appealable. It is a condition precedent of passing the further sentence that the Court should have passed a sentence of penal servitude.

[THE LORD CHIEF JUSTICE: If it was imprisonment, then the Court could not add a further sentence.]

There might be a temptation to a Court which thought that preventive detention would be good for a prisoner, to say that, in these circumstances, it must pass a sentence of three years' penal servitude. The sentence under sect. 11 is clearly not the same as "the sentence" in sect. 3 (c) of the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), for in the latter the leave of the Court must be obtained, unless it is "one fixed by law." The additional sentence could not be satisfactorily reviewed without considering whether the first sentence was unduly severe.

[The LORD CHIEF JUSTICE: Sects. 10 and 13 were passed in the face of this Act. They both contemplate a further sentence. If penal servitude ought not to have been inflicted, then the further sentence could not have been pronounced.]

There are a number of previous convictions against appellant, and it is quite possible that it was in the interests of appellant that the learned Recorder thought that he ought to pass a sentence of penal servitude in order to give himself jurisdiction for the further sentence.

The LORD CHIEF JUSTICE: The sentence referred to in sect. 11 is, in our opinion, the sentence of preventive detention, but as the sentence of preventive detention can only be added where there has been already imposed a sentence of penal servitude, it is possible that the contention for the appellant is correct. We are all satisfied that it would be a very inconvenient practice if there was an appeal as of right against the sentence of preventive detention, and not against the primary sentence. Therefore the Court is of opinion that we should certainly adopt a practice which will render this point practically immaterial, viz., it will give leave to appeal on the primary sentence when there is an appeal against the second, and we will give directions to that effect. We express no opinion that our view is inconsistent with the Act of Parliament. If it is thought advisable, our ruling could be embodied in a statute. We think the Act of Parliament is wide enough to give the man the full right of appeal. A contrary view would involve very great expense, and there is nothing to be gained by it.

Robinson then raised another preliminary point. Appellant was convicted on the 7th of October last, and the Act passed on December 21st last, and came into force on the 1st of August last (sect. 19), and the crime was committed on the 13th of July last. It is a question whether the Act applies to a man who commits a crime after the passing of the Act, but before its coming into operation. Sect. 10 (1) begins: "Where a person is convicted on indictment of a crime committed after the passing of this Act. . ." The Legislature could not have intended that a man's sentence should in any case depend on the date of his trial, which is a matter of chance. But if "passing" here does not mean "coming into operation," such a result would follow, for if this appellant had been tried before August 1st, he would not have been liable to the further sentence. The dating of Acts of Parliament is provided for by 33 & 34 Geo. III.

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c. 13. By that statute the date of "the commencement" of an Act is to be that which immediately follows the title, "where no other commencement shall be therein provided." Then, by sect. 35 (1) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), "'commencement' when used with reference to an Act shall mean the time at which the Act comes into operation." If this contention be correct, the learned Recorder had no jurisdiction to pass this sentence.

[The Lord Chief Justice: The Home Office has prepared and sent out to all the magistrates a memorandum regarding the working of the Act. Time was required to make the necessary prison arrangements.]

J. Mansfield, who appeared in another case (*a*) in which the same point arose, was called upon to argue. He cited *Wood* v. *Riley* (L. R. 3 C. P. 26; 37 L. J. C. P. 24 (1867)). There an Act (30 & 31 Vict. c. 142) provided: "If in any action commenced after the passing of this Act," &c. (sect. 5), and "this Act shall come into operation on the first day of January next after the passing thereof" (sect. 36), and received the Royal Assent on August 20th, 1867. Bovill, C. J., and Keating, J., held that sect. 5 did not come into force till January 1st, 1868. The former said: "The last section (36) of the Act . . . prevents the Act having any operation till after January 1st, 1868. The sections . . . are all to be considered as speaking from the date so fixed, and are all governed by the last section."

The Act cannot apply to a crime committed before the 1st of August.

[The Lord Chief Justice: I cannot think that in this case Keating J. is correctly reported.]

In *Hough* v. *Windus* (12 Q. B. D. 229; 53 L. J. Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 Morrell, 1; C. A. (1884)), Selborne, C., says: "Unless there be anything else in the Act (46 & 47 Vict. c. 52) to require a different construction, or some demonstrable repugnancy or inconsistency, I should myself have thought the

(*a*) See p. 53, below.

rule 'Omnis nova constitutio futuris formam imponere debet et non praeteritis' applicable to an enactment so expressed ['no writ of *levari facias* shall hereafter be issued in any civil proceeding' (sect. 146 (2)]; applicable, that is, with reference to the day appointed for the Act to 'commence and come into operation' (sect. 3), though later than that on which it received the Royal assent. The word 'hereafter' in sub-sect. 2 means after the commencement of the Act; which speaks, generally, from the time of its commencement. If the Legislature had meant to take away rights previously acquired, such an intention . . . . might have been expected to be made unequivocally clear."

[The LORD CHIEF JUSTICE: The whole thing turns upon the meaning of the word "hereafter."]

In a case of this sort one ought to apply the well-known principle that an Act of Parliament has no retrospective effect, unless it affects procedure. Here there is no question of procedure. Having regard to the words of Chief Justice Bovill the Legislature cannot have intended this.

Campbell, in reply: It is not sought here to give the Act a retrospective effect at all. The Act is passed when it receives the King's assent. Administrative matters have to be prepared for, and—as a matter of convenience—Parliament postpones the operation of the Act until a later date. What is the position here? The Act has been passed. Therefore appellant must be presumed to know of the Act of Parliament when he commits the crime. Is there any hardship or injustice to him in saying that if he commits the crime and is brought to trial for it the Act will apply to him? See *Ex parte Rashleigh*, *In re Dalzell* (2 Ch. D. 9; 45 L. J. Ch. D. 29; 34 L. T. 193; 24 W. R. 495; C. A. (1875)), where Lord Justice James says, *inter alia*, "No Court ought to depart from the plain meaning of plain English words, unless coerced to do so by some very serious injustice." There "passing of the Bankruptcy Act, 1861," in sect. 118 of 32 & 33 Vict. c. 71, was held to mean the date of the Royal assent, and not that of the coming into operation. That concludes this case. The plain meaning of the word "passing" ought to be adopted, unless it leads to a patent absurdity or injustice. *Wood* v. *Riley* was a case of procedure.

[DARLING J. referred to a case at Wells, decided by Mr. Justice Phillimore and reported in the *Times* newspaper of October 22nd. It was held that a crime committed before August was not within the Act.]

T. Mathew, for the Crown (in another case (*b*) in which the same point arose): The date upon which the statute is passed, and the date upon which the statute comes into operation, are not necessarily the same dates. By sect. 10 attention is drawn to the date of the *passing* of the Act. There is no repugnance between the sections.

Mansfield, in reply: If *Wood* v. *Riley* was a case of procedure, so much the better for me; but, as a matter of fact, no doubt rights were involved in that case. *Ex parte Rashleigh* was a case under the Bankruptcy Act, which is a different kind of Act altogether. It is an Act of remedial legislation—giving a new remedy to creditors.

[DARLING J.: It is intended to be a remedial Act, and of benefit to the prisoner.]

The LORD CHIEF JUSTICE: In this case a point has been raised, which also arises in another case (*c*). In both cases the crimes were committed between the passing of the Act and the date of its coming into operation. We are invited not to read the words of sect. 10 so as to make the case of crime committed after the passing of this Act, but before it came into operation, within the statute; in other words, we are not to take the words "after the passing of this Act" in sect. 10 in their natural meaning. We cannot accede to this proposition. At one time there was no date in Acts of Parliament, and they were all taken to come into operation at the beginning of the session. Now we have two dates—a date when Acts are passed and a date when Acts come into operation. You cannot take up the statute book without seeing this. In this case it is only necessary to look at this Act to see that it has numerous

(*b*) See p. 53, below.
(*c*) See p. 53, below.

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Charles Smith.

provisions, and that a great many things must necessarily be done before the Act could be effectually worked, *e.g.*, notice had to be given to the gaolers, and to the magistrates, and other work to be carried out. Now it is said that the words in sect. 10 are to be used, not in their natural, but in an artificial, sense. We cannot do this. To come to that conclusion at the present day you must find some necessary implication in the Act you are considering. It seems to us very much for the benefit of prisoners as well as of the public that the wider meaning should be given to the Act, otherwise the sentences might be more severe. With reference to *Wood* v. *Riley* (above), we do not think that what was there held as to another Act applies in the case of an Act like the present. On the other hand, *Ex parte Rashleigh* (above) was a case of very strong authority on the other side, having been decided by James, Mellish and Baggallay L. JJ.

Robinson then contended that the form of the indictment was bad. The jury must find that prisoner is a habitual criminal; but there was no averment to that effect. The indictment merely alleged that he had been convicted three times since he was sixteen, and that he was persistently leading a dishonest life, following the words of sect. 10 (2) (a). A material averment must be pleaded to make him such. Sub-sect. (3) is in the following terms:—"In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal." The rules of pleading in criminal cases have always been very strict in regard to these matters.

[The LORD CHIEF JUSTICE: Was any objection taken at the trial?]

No. Appellant pleaded guilty. I submit that this is immaterial if there has been an omission of a material averment. A merely imperfect averment is cured by the verdict. I submit that this is not a matter which can be cured by verdict. If the matters alleged in the indictment were found, it does not necessarily follow that appellant was a habitual criminal.

[The LORD CHIEF JUSTICE: Why is not this cured by the last part of sub-sect. 4 of the Act?]

This I submit goes to the root of the whole thing. It is more than a mere informality, for the indictment, as framed, does not allege any offence known to the law. (He also contended that the sentence was excessive.)

Campbell: The indictment, I submit, is good, for the reason that in the Act of Parliament there is no definition of the words "habitual criminal" otherwise than in sect. 10. Therefore the Legislature intended this to be the definition of the words. The count follows the exact words of the section. The shorter form authorised by sub-sect. 3 is not obligatory.

The LORD CHIEF JUSTICE: This is the first case under the Act, and it raises a somewhat important point. We think it right to say that but for the provisions of this Act, the sentence was one to which no exception could be taken at all. The terms of penal servitude which appellant had undergone quite justified this sentence. He served three years as recently as 1906. The Act was intended to cure as well as to punish. This appellant has still to serve a year as part of a sentence unexpired. Therefore, before his time of preventive and curative detention begins it may be six years. We think it would be better if he were to be sentenced to a period of three years' penal servitude. We think that no objection can be taken to the form of the indictment. The indictment alleged all the facts necessary to constitute appellant a "habitual criminal." Nevertheless, from the point of view of pleading, it is safer to aver expressly that the accused is a habitual criminal.

Appeal dismissed as regards preventive detention; sentence of penal servitude reduced.

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George Franklin.

GEORGE FRANKLIN.

Prevention of Crime Act, 1908 (8 *Edw. VII. c.* 59).

The three convictions referred to in sect. 10 (2) (*a*) *must be strictly proved: but the record of other convictions may be put in as "evidence of character and repute . . . on the question whether the accused is or is not leading persistently a dishonest or criminal life," under sect.* 10 (5).

This was an appeal by leave of Bucknill J. against a conviction as a habitual criminal under the Prevention of Crime Act, 1908, at Cambridge Quarter Sessions, on October 8th, 1909. Appellant was then sentenced to three years' penal servitude for larceny, to be followed by ten years' preventive detention. His application for leave to appeal against the former had been referred to the full Court by Bucknill J., and he also appealed against the latter term. He pleaded guilty to the felony and not guilty to being a habitual criminal, but was convicted.

H. O. S. Ellis for the appellant (under sect. 10 of the Criminal Appeal Act), who was present: At the trial it was proved that appellant had been convicted ten or eleven times since 1897, and the three necessary convictions under the statute were strictly proved. Notice had been given to appellant that all his previous convictions would be put in evidence, including one at Oxford in 1907 (under the Prevention of Crimes Act, 1871), which was subsequent to the three mentioned. After those three had been proved, a metropolitan police officer produced a register from Scotland Yard shewing all the previous convictions. This was admitted as "evidence of character and repute," under sect. 10 (5) of the Act, "on the question whether the accused is or is not leading persistently a dishonest or criminal life."

In the first place, the register ought not to have been admitted. In itself it is no evidence of a previous conviction. Someone who was present must prove the conviction. This applies especially to the Oxford conviction, as the officer when asked if he knew appellant after 1904 said distinctly, "No." Consequently the latest proved conviction was in 1904.

Secondly, in any case, the Crown had only carried the evidence of a dishonest life down to 1904. Since that date there was no legal evidence of dishonest life.

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George Franklin.

Thirdly, in his summing-up, the Chairman did not point out to the jury that in order to find appellant a habitual criminal they must be satisfied that at the time of committing *the offence charged* (here August 6th) he must have been "leading persistently a dishonest or criminal life."

Moreover, the Chairman told the jury there were six previous convictions for felony—which must have weighed with them—whereas there were only four. Appellant called a witness to character, one Howe, who said that appellant had worked honestly for him between November, 1908, and July, 1909, but the Chairman did not refer to this in addressing the jury.

He is fifty-two years old, but his preventive sentence is the maximum—ten years.

H. St. J. Raikes, for the Crown: We took appellant's convictions from 1887 to 1907. He would be in prison until November, 1908. The sentence of ten years, although it is the maximum, is not necessarily carried out fully. If he behaves he will get out in less time. This Act is passed for the protection of society. I submit that the production of the register of convictions from 1887 to 1907 by the proper officer from Scotland Yard is sufficient evidence of "repute" within sect. 10 (5) of the Act. The section was inserted to cover such cases. The summing-up was, perhaps, not quite full enough.

[DARLING J.: Must he not have been a person who at the time he was taken into custody was leading a dishonest life?]

In the course of the case it was explained by both counsel to the jury that they must be satisfied that the prisoner was a man who was leading a persistently dishonest life. I read the section, 10 (2) (a) to the Court. After enacting that three previous convictions must be proved, it goes on to make the jury find "that he is leading persistently a dishonest or criminal life."

[DARLING J.: If nobody could speak to anything since 1904, where was the evidence to the effect that he was leading a persistently dishonest life? Appellant was not called.

The LORD CHIEF JUSTICE: Ernest Howe was called for the defence, and he said that he had known him for some years.]

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He was called to speak to his being an honest workman, and did so speak about him to a certain extent. That was the only evidence for appellant that was given at all upon oath. Howe's evidence really did not help the man much, as he knew very little about him, and appellant did not give evidence.

[Darling J.: Why should he give evidence? How is the record of the 1907 conviction evidence unless it is proved?]

In 1907 we find by the register again that he is convicted.

[Darling J.: You may find it; but did the jury know it?]

All the previous convictions were read out to the jury. The register was produced.

[Bucknill J.: He was undergoing a sentence of three years' penal servitude from 1904, less a quarter if he behaved himself. In November, 1908, he went into service, and remained until July, 1909. Was he then leading a dishonest life?]

He was engaged in carrying glasses into public-houses, but whether he did that properly and well, I cannot say. The offence charged at Cambridge was stealing in a public-house, and there was a warrant out against him for a similar offence elsewhere.

[The Lord Chief Justice: The notice which is given under the statute deals with the three previous convictions, and they have to be proved in order to satisfy the Act. There are given nine more, the last one at Oxford Police Court, where the sentence was twelve months' imprisonment and his license was revoked. The result was intended that the Act should allow certain evidence—such as police officers generally give—of character and repute to be put in. If this is not the right way of dealing with the case, the Act is unworkable.]

Ellis submitted that the three convictions they did prove were not the convictions they ought to have proved, viz., the three last.

[The Lord Chief Justice: If you wish to adjourn the case in order to have the Oxford conviction proved, we may do that.]

No, I do not want that done.

The Lord Chief Justice: This case raises an important point, which I am glad has been discussed. In our opinion there is no ground for the appeal. My brother Bucknill properly referred this matter to the Court, which raises a question that has been raised in two previous appeals (*a*). The principal point that arises in this appeal is this. Mr. Ellis, who has argued the case with great ability for the prisoner, maintains that there is no sufficient evidence that the appellant was a habitual criminal, or persistently leading a dishonest life, and that the case on that point had not been properly put to the jury. It must be remembered that a summing-up is, as a rule, directed to the questions that have been raised at the trial, and I have no doubt that Mr. Raikes and Mr. Ellis had directed the minds of the jury to the question they had to decide. In those circumstances, the Chairman, calling attention to the evidence, and reading an extract from a circular letter from the Home Office to the justices, it was for the jury to decide, and their minds were sufficiently informed on the matter. Now we are quite agreed that if there had been substantial evidence to go to the jury that this man had been leading an honest life, this summing-up might not have been adequate, but here we cannot say that. What happened was this. In the course of the case three convictions had been proved, and notice had been given of other convictions to shew what was the man's habit of life. Then a witness named Howe was called, who gave evidence that this man had been in his employment, and that he was a perfectly honest man, and that he would take him back, but could not owing to the pressure caused by the Budget. But he was cross-examined by Mr. Raikes, and it then appeared that he knew very little about him. Therefore there was no substantial evidence of an endeavour to lead an honest life. In those circumstances, there is no evidence of the man attempting to lead an honest life to go to the jury, and there was no

(*a*) See pp. 40, 43, above.

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misdirection. Now, coming to the question of practice under the Act, it has been argued that the 1907 conviction ought not to have gone to the jury at all, and therefore no evidence ought to have been given of any conviction at all after 1904. It would be injurious to the prisoner if strict proof had to be given in every case, because matters favourable to him would not be brought out by the police. Mr. Ellis had elicited from the police constable that he, personally, knew nothing of the 1907 conviction, and contended that that ought not to have been put before the jury at all, and that, consequently, there was no proof of any conviction since 1904. But Mr. Raikes has called our attention to sect. 10, sub-sect. 5, of the Prevention of Crime Act, 1908. When that clause was under discussion in Parliament it was pointed out that it would be injurious to the prisoner as well as to the prosecution, if the long-established practice of calling police evidence of this character was discontinued, inasmuch as the police, as a rule, say what they have to say, whether it be for or against an accused person, with conspicuous fairness. Therefore this sub-section was inserted. But for this section I think Mr. Ellis's objection would have been perfectly well founded. A conviction must be strictly proved. The offence was committed upon the 6th of August, he was tried upon the 8th of October, nearly three weeks after he gets notice of all these previous convictions, which are material for the purpose of considering whether he was leading a dishonest or criminal life. In these circumstances, it seems to us impossible to say that there was not before the jury evidence of his persistently leading a dishonest and criminal life, which might have been refuted by evidence called upon his behalf. But Mr. Ellis frankly confessed that he had not put him in the witness-box because he would have had to admit, in cross-examination, that he had been convicted in 1907. In these circumstances, we wish it to be distinctly understood that this kind of evidence of repute of either good or bad character may be given. For these reasons, on the substantial question of the finding of the jury, we are of opinion that there is no ground for appeal against the conviction. The only other point is as to the sentence of penal servitude. We are all of opinion that three years was not really too severe, but with regard to the ten years, we think that, under the circumstances, it is too long; and, although the Home Secretary can interfere, and the Visiting Committee might deal with the matter frequently, yet the fact remains that, if the man does not behave properly, he would be in prison for thirteen years. We do not consider this a case for the maximum period of preventive detention. We think that ought to be reduced to one of five years.

Sentence of preventive detention reduced.

JAMES WESTON (*a*).

Prevention of Crime Act, 1908 (8 *Edw. VII. c.* 59).—*Objections that proper notices, under sect.* 10 (4) (*b*), *have not been given, must be taken at the trial.*

This was an appeal from an order of Bray J. refusing leave to appeal against a conviction for larceny, committed on July 6th, 1909, at Folkestone Quarter Sessions, on September 27th, 1909; an application (referred to the full Court by Bray J.) for leave, if necessary, to appeal against the sentence, then inflicted, of three years' penal servitude; and also an appeal against the further sentence of five years' preventive detention.

Mansfield, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, took a preliminary point which was argued in the case of *Charles Smith* (*a*). He now took the further point that the conviction as a habitual criminal was bad, because there was no evidence that sect. 10 (4) (b) of the Prevention of Crime Act, 1908, which enacts that at least seven days' notice

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(*a*) See p. 40, above.

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James
Weston.

must be given to the prisoner that he will be so charged, had been complied with.

The LORD CHIEF JUSTICE: An objection of that nature should be taken at the trial, so that, if necessary, the trial may be postponed.

T. Mathew, for the Crown, was heard in the case of *Charles Smith* (*a*), but was not called on as to the facts of this case.

Appeal and applications dismissed.

George
Simpson.

GEORGE SIMPSON.

The Court will review a conviction due to a mistake in fact made in summing up.

This was an appeal against conviction and sentence by leave of Bucknill J. Appellant was convicted at the Middlesex Sessions, on September 28th, of obtaining money by false pretences, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour, being equal consecutive terms on three counts, respectively, of the indictment.

The appeal on the facts was not of general interest, but *Burnie*, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, stated that a very remarkable state of things occurred as to the third count. Evidence was given by one Barratt, of Amersham, of a fraud upon him by appellant: this case (in another county) was not charged in the indictment, but was evidence to prove system and negative accident. The learned Chairman, in summing up, made a mistake and, being under the impression that this case was substantively before the jury, directed them upon it. The Clerk of the Court, in taking the verdict, fell into the same error, and asked the jury whether they found prisoner guilty in

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(*a*) See p. 40, above.

respect of "the third count (Barratt)," and they said they did. The name was mentioned. Clearly, therefore, the conviction and sentence on the third count could not stand.

Slade Butler, for the Crown, said that in opening he did not refer to the Barratt affair or mention his name. He called him only to prove system. If the direction can have misled the jury, then the sentence ought to be reduced.

The Court: The sentence must be reduced by six months.

Conviction quashed on third count.
Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BUCKNILL AND MR. JUSTICE WALTON.

RICHARD WOOLLEY.

1909
4 November

Richard
Woolley

The Court of trial has power to amend a clerical error in the order of commitment.

This was an appeal from the order of Bucknill J. refusing leave to appeal against sentence, and legal aid. On 24th August, 1909, the Deputy-Chairman at the County of London Sessions sentenced prisoner to six months' imprisonment with hard labour for a breach of prison rules and misconduct while serving a sentence of eighteen months' imprisonment for warehouse-breaking.

Appellant (in person): In the first order of commitment the sentence was in error stated to be "concurrent" with the sentence in operation, and an amended order was made in which the sentence was made "consecutive." Appellant claimed that the first order must hold good and that the amendment should not be allowed.

The LORD CHIEF JUSTICE: In the first commitment order the word "concurrent" was accidentally inserted instead of the word "consecutive." In the case of an independent subsequent offence like this we are doubtful of the legality of a concurrent sentence. If the subsequent offence is a felony, there is power to impose a consecutive sentence by statute 7 & 8 Geo. IV. c. 28, s. 10. If a judge did not desire to inflict any further punishment, the proper course would be to pass a nominal sentence, not one to run concurrently. But even if we quashed the sentence the result would be the same, as we should be bound to pass the proper sentence.

Application refused.

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4 *November.*

Charles A. Shapcote, *alias* Arthur Heathcote.

CHARLES A. SHAPCOTE, *alias* ARTHUR HEATHCOTE.

A judge is not bound, in passing sentence, to take into account other charges pending against the defendant.

This was an application (referred by Bucknill J) for leave to appeal against a sentence of three years' penal servitude passed at the Northants Quarter Sessions on October 21st, for obtaining goods by false pretences. Two other charges were taken into consideration at Northampton. This sentence was on a charge for which he was arrested at the end of another term, viz., six months imprisonment, under a sentence at Bradford. He complained that at Bradford the offences charged at Northampton ought to have been considered, but the justices had refused to do so because he would give no information as to the stolen property.

Appellant, who was not present, contended (in a written statement) that in giving sentence a judge was bound to take into account and to sentence him for all other charges against him which he admitted.

The Lord Chief Justice: *Syres* (73 J. P. 13; 25 T. L. R. 71; 1 Cr. App. R. 172; (1908) C. C. A.) only decides that a judge *may* take into account other charges which a prisoner admits in passing sentence. It would be a serious innovation to extend this principle, and to make it compulsory upon the judge so to do in the manner suggested. We see no reason why the Court should lay down any such rule.

Application dismissed.

Henry Cooper

HENRY COOPER.

Severity of sentence.

This was an appeal against sentence, by leave of Bucknill J., who had also granted an extension of time. Prisoner was sentenced by the Deputy-Chairman, at the County of London

Sessions, for breaking and entering on 16th December, 1908, to two years' imprisonment with hard labour. He had been convicted six times, the last time in 1905, when he had been sentenced to fifteen months' imprisonment with hard labour.

Appellant was not present. *Weigall*, for the Crown, stated the previous convictions.

Appeal dismissed: Sentence to run from the date of conviction.

KATE EDWARDS.

Kate Edwards.

Severity of sentence.

The police are bound to inform the Court of trial, after conviction, of all information bearing on defendant's character, including mere matters of suspicion.

This was an appeal (by leave of Bucknill J.) against a sentence of twelve months' imprisonment with hard labour for larceny, passed by the Recorder at Cardiff Quarter Sessions on October 13th. There was also an appeal against the order refusing legal aid.

Appellant, who appeared in person, stated that she was a respectable woman and had never been in prison before. She had pleaded guilty to the larceny.

Llewellyn Williams for the Crown: Appellant was a domestic servant and employed by a Mr. Box, senr., and had been sent with other servants by her master to look after the house of his son, Mr. Box, junr., during his absence from home. On his return she went back to her employer's house. Mr. Box, junr., found that a number of his goods were missing; appellant's trunk was opened and found to contain all the missing property save two valuable vases, which it was subsequently discovered she had sent as a wedding present to some friends. As to her claim to be a respectable woman she had been fined 20s. (with costs) in 1906 for theft—since then she had been to a Home, and on leaving there had been to several situations. In only one case had she obtained a character. It was stated that articles were found missing whenever she left a situation. On her arrest property that had been lost from a house in Barmouth where she had been employed, and

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Kate Edwards.

various articles from other situations were found in her possession, but the learned Recorder had only taken into consideration the charge to which she had pleaded guilty.

Appellant, in reply, denied having stolen in previous situations, and said she had never been in a Home. At the time she stole these goods she was under a doctor, and did not realise what she was doing.

The LORD CHIEF JUSTICE: This is a serious offence—a domestic servant has naturally to be trusted by her master, and prisoner has appropriated a quantity of valuable property. The learned Recorder has only sentenced her for this one offence—he could not take the other charges into account in determining sentence, since prisoner denied them—but on the question of character it has been the practice of the Courts for years that information even of suspicious events may be given; this practice may be in the interest of the defendant, as the police should report anything they discover favourable to the accused. The question whether the judge should take notice of offences not admitted by the defendant has nothing to do with evidence being given whether the defendant has worked or not, or left the last place with or without a character, and the like. Such matters ought always to be taken into account. In our opinion the sentence is not too severe, but we think that in this case the police should not proceed with the other charges. Sentence will run from the date of conviction.

Appeal dismissed

George Sidney Curtis.

GEORGE SIDNEY CURTIS

Severity of sentence.

This was an appeal against sentence by leave of Bucknill J.

Appellant pleaded guilty, on 13th October, 1909, at Bournemouth Quarter Sessions, to obtaining goods by false pretences, and was sentenced to three years' penal servitude. He had been convicted on twenty-three occasions since 1881, the last being on April 14th, George Sidney Curtis.

1908, when he was sentenced to fourteen months' imprisonment with hard labour.

Appellant was not present.

Hamilton Dent for the Crown.

The Lord Chief Justice: From 1881 the prisoner has been constantly convicted of small offences, and it is plain that small sentences have had no effect. The learned Recorder may well be justified in thinking that penal servitude should now be tried.

Appeal dismissed.

THOMAS WILLIAM BULLOCK.

Thomas William Bullock.

Severity of sentence.

This was an appeal, by leave of Bucknill J., against sentence.

The appellant was convicted on 19th October, 1909, at the Hertfordshire Quarter Sessions, of robbery with violence. He pleaded guilty, and was sentenced to five years' penal servitude. He had been convicted seven times in the last seven years, one sentence being three years' penal servitude.

Appellant, who was present, had sent a written statement, in which there was a suggestion that he was mentally deficient, and that at the time of the offence he was not in complete possession of his senses.

Ronald Walker, for the Crown: A lady was riding a bicycle along a lane. Appellant pushed her off, took her bag, made a threatening gesture and ran off across a field. The lady was able to continue upon her way and report the case to the police.

Bucknill J.. This is a difficult case. No doubt severe sentences should always be passed when men make a cowardly attack upon women. This certainly was a cowardly attack, and the Court cannot accept appellant's statement that he was not in full possession of his senses. Fortunately for him, the attack cannot have been very violent, since the lady was able to continue on her way, and it does not appear that the prisoner struck her. In the circumstances, we think the term should be reduced to three years, and that the sentence should run from the date of conviction.

Sentence reduced.

James Jones.

JAMES JONES.

Severity of sentence.

This was an appeal from the refusal of Bucknill J. to grant leave to appeal against conviction, and legal aid, and an appeal against sentence by leave of the same learned judge.

Appellant (who was not present) was convicted before the Common Serjeant, at the Central Criminal Court, of robbery with violence on October 7th, 1909, and sentenced to four years' penal servitude and fifteen strokes of the "cat."

Methven, for the Crown, stated the facts. Appellant, with other men, had decoyed an excursionist who asked the way to Euston Station to the bank of Regent's Canal, had knocked him down, kicked him on the face and wrist, and stolen two watches and a chain and some medals. He had a bad record, and was said by the police to be a desperate thief, and to belong to a most dangerous gang who made a speciality of robbing excursionists.

The Lord Chief Justice: Appellant's previous convictions were not taken into account at the trial—the learned judge distinctly said so. Since 1899 he has been convicted of a continuous series of assaults and robberies. In December, 1907, he was sentenced to nine months' imprisonment with hard labour, and in November, 1908, to twelve months. In view of his career this sentence is not too severe.

Appeal dismissed.

JOHN F. DOWLING.

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4 *November.*

John F. Dowling.

Severity of sentence.

This was an appeal against sentence by leave of Bucknill J. At the Cheshire Quarter Sessions on 20th October, 1909, appellant pleaded guilty to stealing boots and was sentenced by the Chairman to three years' penal servitude.

Appellant was not present.

A. J. Lawrie, for the Crown, stated the facts.

The LORD CHIEF JUSTICE: Appellant has had eighteen previous convictions—eight or ten of them since 1906. Small sentences have failed, and penal servitude may possibly lead to reformation. We think that the Chairman has properly exercised his discretion.

Appeal dismissed.

ALICE SPRAKE.

Alice Sprake.

Severity of sentence—First offence.

It may be necessary to take into account in sentence the necessity of "making an example."

This was an appeal against sentence by leave of Bucknill J.

Appellant was convicted on October 21st, at Cardiff Quarter Sessions, of stealing and receiving six pennyworth of coal from the Taff Vale Railway Company, and was sentenced by the Recorder to four months' imprisonment with hard labour. She was on bail for two months before the trial.

B. Langton for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant had been in the habit of sending her young sons to take coal from a siding of the Taff Vale Railway. The siding was only protected by wire and boards, and the jury stated that in their opinion it ought to have been more securely guarded. A policeman stated it was the common practice of the neighbourhood to take the coal, and that these boys were day after day taking it, and that appellant made a practice of selling what they stole. Her defence was that

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Alice Sprake.

all the neighbours took coal from this siding, and she thought she had a right to do so. There was nothing else of any sort alleged against her.

Owen Beasley, for the respondents: There had been ninety prosecutions for thefts of this sort at the spot in question within the last three years. A lot of coal was found at appellant's house. Her son had been chased away from this spot by the police on at least one occasion; there was evidence that theft occurred frequently, and this appellant must have known.

The Lord Chief Justice: In his summing-up the Recorder warned the jury that if they believed that appellant thought she had any right to the coal they must acquit her. The jury found her guilty, and there certainly was evidence to support that verdict. We must therefore assume that she was quite aware of the illegality of what she was doing. In giving sentence the Recorder was entitled to take into consideration that a regular practice of stealing coal had grown up in the district, and might fairly consider that it was time to make an example. Although appellant was formerly of good character, and this was her first offence, it cannot, in our opinion, be said that four months' imprisonment with hard labour was too severe a sentence. The sentence may run from date of conviction.

Appeal dismissed.

Solicitors for Respondents: *Williamson, Hill & Co.*

John Grout.

JOHN GROUT.

Sect. 1 (*f*) (*ii*) *of the Criminal Evidence Act*, 1898 (61 *&* 62 *Vict. c.* 36), *considered:—"A person charged and called as a witness . . . shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . .* (*ii*) *he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the*

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nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

Answers in the nature of imputations on witnesses, elicited solely by questions to defendant in cross-examination, are not made in the "conduct of the defence." The judge should disallow any cross-examination likely to lead defendant unwittingly into incriminations (*a*).

This was an appeal by leave of Bucknill J. against a conviction for larceny of a gold watch, at Bedfordshire Quarter Sessions, on 13th October, 1909.

Appellant was sentenced to four years' penal servitude. He had been several times previously convicted, and had been sentenced to terms of six and eight years' penal servitude respectively.

W. E. Bousfield for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. I defended at the trial. The facts are shortly these:—In a crowd at Sandy Flower Show a gold watch was taken from the pocket of a Mr. Henderson, who seized appellant and handed him over to the police. The watch was not found on appellant. A constable said he had been watching him and some confederates for some time previously, as they were loitering about in a very suspicious manner and pushing into the crowd wherever there was one. The prosecution suggested that appellant passed something to a confederate, who immediately hurried away just as Mr. Henderson seized the former and gave him in charge, but there was no evidence of this. During the cross-examination of appellant, the following dialogue took place:—

"All the prosecutor has said is not true?—No, he has made a mistake.

What the constable says about your loitering about with another man is not true?—The constable was not there.

The constable has been telling lies, has he?—Of course he has. I am speaking truly.

The constable, 'of course,' is telling lies. Why 'of course'?—They could not do such a thing—a constable could not.

Or could not tell the truth—which do you mean? You have heard the constable tell the Court and jury he saw you and another man loitering about there for a considerable time.—I say it is false . . . .

You say it is untrue that he saw you and others loitering

(*a*) See *Richard Jones*, p. 67, below.

about?—It is untrue so far as loitering about suspiciously is concerned.

Do you mean to say the constable is telling lies?—He is.

Why should a constable come here and commit perjury?—I can prove it to you that he has told lies."

At this point *Adkins* submitted that prisoner had made an "imputation upon the character" of a witness for the prosecution within the meaning of sect. 1 (f) (ii) of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) (above, p. 64), and despite counsel's objection, appellant was cross-examined as to his previous convictions.

It is submitted that the answers here were not an "imputation" within the meaning of the section, that they arose not out of "the conduct of the defence," but out of the conduct of the prosecution, that the words were practically put into appellant's mouth, and were really in the nature of a trap. Counsel referred to *Rouse*, (1904) 1 K. B. 154; 73 L. J. K. B. 60; 20 Cox C. C. 592; 89 L. T. 677; 52 W. R. 230; 20 T. L. R. 68; 68 J. P. 14; C. C. R.; *Bridgewater*, (1905) 1 K. B. 131; 21 T. L. R. 69; 74 L. J. K. B. 35; 21 Cox C. C. 737; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; C. C. R.; *Preston*, (1909) 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280; 2 Cr. App. R. 24; C. C. A.

Ryland Adkins, for the Crown, submitted that appellant had deliberately accused the constable of perjury, and that evidence of the previous convictions was properly admitted. The Chairman had told the jury to dismiss that subject from their minds.

The Lord Chief Justice: This is a case as to the admissibility of evidence of previous bad character. When a man in appellant's station of life uses such terms as "he is lying" and "it is a lie," or even stronger expressions, all that is generally meant is a denial of the truth of the case for the prosecution and not a real reflection upon the character of the witness. In this case it seems to us that appellant's words were only an emphatic denial of guilt, and as such do not come within the words of the section. Then, too, the answers were elicited in cross-examination and not given as part of the defence. We are sure that counsel for the Crown did not and would not intentionally lead on the prisoner to attack the character of a witness so as to admit evidence of his own previous convictions. But if any Court finds that a defendant is being unwittingly led on to make such statements, the judge ought at once to disallow cross-examination which is in the nature of a trap. In this case we cannot say that the jury must have convicted even if evidence of previous convictions had not been given, and therefore the conviction must be quashed.

Conviction quashed.

RICHARD JONES.

Richard Jones.

Sect. 1 (*f*) (*ii*) *of the Criminal Evidence Act considered* (*a*).

This was an appeal on a point of law against conviction for rape at Ruthin Assizes on 18th October, 1909. Channell J. sentenced appellant to seven years' penal servitude. The offence was committed on his own daughter, Annie, aged 13; there was another similar indictment in respect of another daughter, which was not tried. The question was as to the admissibility of a question asked the prisoner in cross-examination (*b*), whether he had in 1907 had connexion with another daughter, Margaretta, who was then under 16. Appellant gave evidence through an interpreter, and in the course of cross-examination had stated that Annie Frances, who had given evidence (also through an interpreter), was lying, "in order to injure" him, that he had often known Margaretta to tell lies, and that their mother "for one," or "somebody else," had invented the tale against him. On each of these occasions Channell J. refused to allow counsel for the prosecution to question prisoner as to this matter—the question having been put in writing and shewn only to his Lordship. Eventually the following cross-examination occurred:—

"What makes you say that your wife has induced the children to tell this story?—Because I said I was going to sell the things up and leave her.

(*a*) See p. 64, above.

(*b*) See *Grout*, p. 65, above.

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Leave her? What for?—Because we could not agree.

Is that the only reason?—I heard the children saying that a man used to come from the house when I was from home.

You suspected your wife of immoral conduct with another man? —Yes."

At this point the learned judge gave permission to put the questions mentioned.

"In January, 1908, was your eldest girl, Margaretta, delivered of a child?—Yes.

Are you the father of that child?—No."

Ellis J. Griffith (with him *T. H. Parry*) for the appellant, who was not present, argued, (i) that the attack on the character of the witness for the prosecution was not such an attack as was contemplated by sect. 1 (f) (ii) of the Criminal Evidence Act, 1898 (*c*); (ii) that in any case the attack did not arise "from the nature or conduct of the" defence within the meaning of the section, and (iii) that the cross-examination of prisoner had been in the nature of a trap. The defence being that the child's story was untrue, all that appellant said necessarily followed in its development. The final point at which the evidence was let in was *an answer* to a question, "You suspected your wife, &c.?"—*i.e.*, the answer was put into his mouth and he assented.

In *Bridgwater* (*d*) the Lord Chief Justice said: "If the questions put to M. had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character." Here the imputations were clearly not independent of the defence, but a necessary part of it.

In *Preston* (*e*), Channell J., adopting the principle thus laid down in *Bridgwater*, said: "If the nature of the defence involves the suggestion that the case for the prosecution ought not to be believed because of the misconduct of one or more of their witnesses, apart from their evidence, then it is permissible to enquire into the previous history of the person making these suggestions."

(*c*) See p. 64, above.
(*d*) See p. 66, above.
(*e*) See p. 66, above.

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Artemus Jones (who had prosecuted below), for the Crown, contended that, in fact, prisoner had voluntarily attacked the character of the witnesses. The section was intended to let in such cross-examination, even though the imputation was the only and necessary defence. The point that the imputation was made during cross-examination is immaterial, as the section is not confined to what prisoner said in examination-in-chief.

The whole nature of the defence was that the wife and children had concocted this story to get rid of the prisoner. Even if the nature of the defence compels prisoner to enter into details and thus to attack the character of the witnesses for the prosecution, then evidence of prisoner's character, and such questions as were asked in this case, are clearly relevant. There was no trap. I merely pressed to a logical conclusion his answers in examination-in-chief. Further, he denied the suggested charge, and the judge expressly told the jury that they were bound by his denial. This case went far beyond a mere "emphatic denial" in *Rouse* (*f*). The last question asked simply put into more explicit terms the innuendo which prisoner had conveyed in his previous answer.

Ellis Griffith, in reply, stated that prisoner's statements were only dragged out despite great reluctance. The words of the statute are, "shall not be *asked.*" If the question, therefore, was inadmissible (apart from the answer), the conviction is bad.

The Lord Chief Justice: The general rule in a case of this kind is clear, but its application must depend upon the facts in the particular case. If an attack upon the character of a witness for the prosecution results merely from questions put to him in cross-examination and not raised in any way as part of the defence, such attack would not justify the admission of evidence as to prisoner's character. *Primâ facie* answers in cross-examination are part of the case of the prosecution, and do not shew the nature or conduct of the defence, but it cannot be laid down as an absolute rule that no answer in cross-examination can let in such evidence. If the judge thought that a prisoner might be unwittingly prejudiced by answering a question or that a trap had been deliberately or unconsciously laid for him, he clearly ought to disallow the

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(*f*) See p. 66, above.

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question. It seems to the Court that, taking together the whole of what happened in this case, Channell J. was justified in ruling when he did, that evidence as to prisoner's character was let in under the words of the section. Even though appellant attacked the child's veracity, he was certainly not compelled to go on to speak as he did of the mother. As to the suggestion that this was a trap laid for the prisoner, the Court does not agree that in this case there was any such attempt, but we should strongly deprecate any endeavour by counsel to put questions in such a form as to lead a prisoner to answer in a way which would expose him to coming within the statute.

Appeal dismissed.
Sentence to run from date of conviction.

Solicitors for Appellant: *Churchill & Co.*, for *R. E. George*, Newtown.

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Harry Benson.

HARRY BENSON.

Sect. 1 (*f*) (*ii*) *of the Criminal Evidence Act,* 1898, *considered* (*a*).
Technical objections to the admission of evidence must be taken at the trial.

Appellant was convicted on October 7th at the Central Criminal Court, after a four days' trial before Darling J., of misappropriation as director of a public company, under sect. 81 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), of publishing a false statement with intent to induce persons to entrust money to another public company, under sect. 84 of that Act, and of obtaining money by false pretences, and was sentenced to five years' penal servitude. He made various applications to the Court, and appealed on points of law, the argument on which is alone reported.

Patrick Hastings for the appellant, who was not present. (i.) The copy of a letter in a letter-book was admitted as evidence against appellant, greatly to his prejudice, purporting to be written by his manager, who was not called for the prosecution, to a person who was not called. Both or either should have been called for the prosecution. [He was called by the prisoner.]

(*a*) See pp. 64, 67, above.

(ii.) The false pretences alleged to have been made by appellant as to the position of Feltham's Bank were not sufficient to support the indictment—even if they were false. The words "authorised capital, 100,000*l*.," which appeared in the prospectus of the bank, could not fairly and reasonably be interpreted to mean "paid-up capital." That was a question for the judge (*King*, (1897) 1 Q. B. at p. 219; 66 L. J. Q. B. 87; 18 Cox C. C. 447; 75 L. T. 392; 61 J. P. 329—C. C. R.), and it should never have been left to the jury at all. See *Cooper*, 2 Q. B. D. 510; 46 L. J. M. C. 219; 13 Cox C. C. 617; 36 L. T. 671; 25 W. R. 696—C. C. R. (1877) Nor was there evidence that there was not a genuine banking business. The allegation in the indictment that the business was represented as "prosperous" was not the proper subject of a charge of false pretences. *Williamson*, 11 Cox C. C. 328; 21 L. T. 444 (1869), where the representation that prisoner was doing a "good business" was held, "although grossly fraudulent, not the subject of a criminal proceeding."

(iii.) Appellant was allowed to cross-examine a witness for the prosecution in a manner which brought him within the peril of the Criminal Evidence Act, 1898, s. 1 (f) (ii), *i.e.*, of cross-examination as to character. He received no warning, though he was undefended. As soon as he went into the box he was warned by counsel for the prosecution that if he gave evidence of his own good character the prosecution "would have a word to say about it." Thereupon he desisted from any such favourable evidence, but, nevertheless, immediately the cross-examination began counsel for the Crown asked and obtained leave to cross-examine him as to character, with the result that a previous conviction in the United States was brought out, which destroyed any chance of an acquittal. As he had desisted from his line of defence as soon as he was warned, his previous cross-examination of a witness—probably in ignorance of the law—ought not to have been allowed to let in the previous conviction.

Muir and *Graham Campbell*, for the Crown, were not called upon.

The Lord Chief Justice said (as to the points raised above) that appellant had defended himself with great ability for four days, and the Court could not now entertain points raised by

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counsel, who was not at the trial, which might have been taken then. As to the false pretences alleged, the prospectus and the "Yellow Book" issued abundantly represented that the bank was safe and had properly invested its capital. In fact it was insolvent, and at last there was a deficit of 24,000*l*. There was abundant evidence that the representation that the bank was a genuine and honest business concern was false. It was clear that appellant had been warned by Mr. Muir—most properly, as was usually done by counsel for the Crown—of the risk he ran if he set up his own good character, but that was quite a different matter from a warning not to attack someone else's character. The "nature and conduct of the defence" in this case certainly justified the cross-examination.

Appeal dismissed.

Solicitor for the Appellant: *W. H. Speed.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING
AND MR. JUSTICE BUCKNILL.

THOMAS SMITH (a).

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Thomas Smith.

Insufficient identification alleged.

This was an application, referred to the full Court by Bucknill J., for leave to appeal against conviction, and to call further evidence.

Appellant was convicted at the Herefordshire Quarter Sessions, on October 18th, of obtaining a horse by false pretences by means of a worthless cheque, and was sentenced to twelve months' imprisonment with hard labour.

Bosanquet, for the appellant, who was not present. There was not sufficient evidence to support the conviction. The sole question was one of identity, and this had not been established. The prosecutor had admitted that the first time he saw the prisoner was when he was in the custody of the police constable, and the second witness never saw the prisoner between the time he was at the police station and in the dock. The horse had never been traced to his possession. It is desired to call an expert in handwriting as to the cheque.

The LORD CHIEF JUSTICE: We think there is sufficient doubt as to the weight of the evidence, and that leave should be given for the appellant to be here. We shall have the advantage of hearing the case for the prosecution. The summing-up in the shorthand notes is obviously not full or correct. Leave cannot be given to call an expert in handwriting.

Application granted.

Solicitors for appellant: *Thorne, Robinson & Co.*, for *Thorne and Haslum, Wolverhampton.*

(a) See p. 87, below.

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Thomas
Herbert
Castleton.

THOMAS HERBERT CASTLETON.

The Court may accept the evidence of finger-prints though it be the sole ground of identification.

This was an appeal from a refusal of Bucknill J. to grant leave to appeal against a conviction for burglary. Appellant was sentenced at the West Riding Quarter Sessions, on October 21st, to three years' penal servitude.

Milton Barber (under sect. 10 of the Criminal Appeal Act) for appellant, who was not present. The conviction is bad, as the only evidence against appellant was that of finger-prints upon a candle left behind. He was not defended at the trial. There was no other evidence against appellant. Even supposing the prints on the candle are those of appellant, the evidence is not sufficiently weighty. He was an associate of thieves, and it may have been that the finger-prints were put there by someone else.

[DARLING J: Can the prisoner find anybody whose finger-prints are exactly like his?]

Counsel said he was not instructed as to that, but the candle might have been used by somebody else, although it belonged to appellant. He referred the Court to a photograph of the impressions of the prints.

The LORD CHIEF JUSTICE: We are clearly of opinion that this application must be dismissed. The suggestion has been made that these finger-prints may have been put there by someone else, but that suggestion was disposed of by the jury, who decided upon the evidence before them. Our attention has been drawn to the photographs of the impressions of the finger-prints. Looking at the middle finger particularly, as well as to the index finger of the right hand, we agree with the evidence of the expert at the trial.

Application dismissed.

WILLIAM EDWARD EVISON.

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William
Edward
Evison.

The judge ought emphatically to caution a jury against being influenced by the unfounded suggestion of a previous conviction.

This was an appeal, by leave of Bucknill J., against a conviction at Spalding Quarter Sessions, on October 21st, for obtaining by false pretences certain food and drink, to the value of 8*s.* 9*d.*, and one shilling in money, from William Curley, at Boston, on August 21st, 22nd, 23rd, and 24th, 1909. He was sentenced to one month's imprisonment with hard labour.

On Saturday, August 21st, at 10 p.m., appellant, who described himself as an engineer, went to the "Lord Nelson" public-house at Boston and represented to the landlord, William Curley, that he (appellant) was engaged by a Mr. Disbrowe at Bennington to put up a windmill; that he had complained at the police station about certain tools which he had lost; and that Sergeant Selby, of the county police, had recommended him to the landlord of the "Lord Nelson" for lodgings.

The evidence shewed that no tools had been lost and no mill was being erected, but it appeared that Mr. Disbrowe, who was the rector of Bennington, gave the appellant some work to do in his orchard upon August 21st, and paid him 7*s.* 6*d.*, and that afterwards, on the same day, appellant went to Boston, where he was in the company of Sergeant Selby from 8.30 p.m. until 9.45 p.m. Subsequently he went to stay at the "Lord Nelson." The jury found him guilty of obtaining board and lodging by false pretences.

Nickalls for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. The evidence did not support the verdict. The case for the prosecution never was a very strong one, and the false representations relied on did not amount to false pretences.

The landlord of the "Lord Nelson" was asked, "On account of his representations did you accept him as a lodger?"

The reply was, "Yes, because he told me Sergeant Selby had sent him."

It was true that in reply to the further question, "And that he was putting up a windmill?" he said "Yes." But this answer

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was suggested by counsel for the prosecution, and in the summing-up the evidence was not properly laid before the jury.

Other leading questions had been improperly put by the prosecution, and after appellant had made his statement to the jury, a most improper question was asked him, namely, whether he had not been previously convicted, to which appellant answered, "I have never suffered imprisonment, and you had no right to ask me that question at all. If convicted, I shall appeal on this point." In such a case as this, if evidence had not been wrongly admitted, the jury would have acquitted.

Appellant had paid the landlord money (though prosecutor did not admit this) and had informed him that he was daily expecting a letter, and on the Monday (August 23rd) a telegram was sent off asking for a remittance. Subsequently money was sent to appellant. At the trial it was wrongly stated that appellant had only written after arrest.

Lawrie, for the Crown.

The Lord Chief Justice: The appellant is charged with obtaining certain food and drink under false pretences. The facts of the case shew that he had been working for Mr. Disbrowe.

There was, however, evidence to go to the jury on which they might have convicted him, because he said certain things which turned out to be untrue. But the fact that a man has been convicted must never be unfairly used to prejudice the minds of the jury. He had made a statement in which he said, "It is not imprisonment I care for. I don't care a scrap about that, for I have roughed it in America, and in Africa. The food a man would get in prison is far better than what I have put up with on the West Coast of Africa; but I have a wife and three little children, and whether I got one day or one year, I should be absolutely ruined." That did not justify the question whether he had been previously convicted, for the appellant had said nothing about not having been convicted.

It is quite possible, therefore, that the opinion of the jury may have been influenced against the appellant by the question, for the jury might understand from it that there had been a conviction, and they were not cautioned, as they ought to have been, in the summing-up against drawing any conclusion adverse to the appellant.

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The other points raised by the defence do not appear to us to be of much importance, but we think that matters were before the jury which ought not to have been before them, and the conviction must therefore be quashed.

Conviction quashed.

BENJAMIN HENRY DINNICK.

Benjamin
Henry
Dinnick.

A judge in summing up is bound to put the defence, however weak, before the jury.

This was an appeal by leave of Bucknill J. against a conviction at Bristol Quarter Sessions, on October 28th, for wilfully and maliciously disquieting and disturbing a religious meeting under 52 Geo. III. c. 155, s. 12 (extended by 9 & 10 Vict. c. 59, s. 4, to all lawful meetings for religious worship). The appellant, who was a deacon of a certain body known as the "One Holy Catholic and Apostolic Church" at Bristol, entered the church during the service with his hat on, and called out in a loud voice, "People of Bristol, this is the abomination of desolation spoken of by Daniel the prophet." He was sentenced to a fine of 40*l*., and in default of distress to be imprisoned for one month as a first class misdemeanant, under sect. 12 above, which runs:—"If any person or persons, at any time after the passing of this Act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorised by this Act, or any former Act or Acts of Parliament . . . . such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of 50*l*. to answer for such offence, and in default of such sureties shall be committed to prison, there to remain until the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain or penalty of 40*l*."

R. B. Murphy for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. The conviction is bad on the face of it, and would have been quashed on a writ of error. At common law an alternative sentence could not be given, unless sanctioned by statute, but here imprisonment could only be inflicted after the sentence of fine in default of distress. It was true that appellant had informed the Recorder that he had no goods. Appellant had been in prison for three months.

[The LORD CHIEF JUSTICE: You only have leave to appeal against conviction, but this is an appeal against sentence. Even if we had to quash the alternative of imprisonment the fine would remain.]

Appellant had not had a fair trial. He wanted to ask whether there were prophets in the church, as he had the right to express his prophecies as well as anybody else in the church; but the Recorder did not think it necessary to deal with that defence. It was not wrong for a minister of a particular church to express his views of their religious ceremonies. No doubt it was wrong to keep his hat on. It might have been left to the jury whether appellant in keeping his hat on had been guilty of a technical offence.

[DARLING J: What he did was to walk in with his hat on and say: "This is the abomination of desolation." Could anything be more "disquieting" to a religious meeting than that?]

That should have been left to the jury. It might not be disquieting to this congregation. The church recognized prophets and some sort of spiritualistic *séances*, as well as some very solemn religious ceremonies. Appellant stated he could not be removed from his office except by the founders of the church, and that it was part of the constitution of the church that none of the apostles could be bishops or "angels" in the church, neither could they remove those in high office. The last of the apostles had died nine years ago, and that caused a breach of their constitution and his (appellant's) wrongful removal from office. Appellant denied having called the congregation names. He attempted to put his protest and he was stopped. This defence should have been left to the jury.

E. H. C. Wethered for the Crown: The case was not pressed against the man. Appellant declined to be bound over. It was true that members of the church were allowed to rise and speak, but even assuming appellant had a right to object to the service, he had no right to do it in the way he did. He declined to be bound over, so there was nothing for the Recorder to do but sentence him to the fine imposed by the Act.

The Lord Chief Justice: We have come to the conclusion, not without very great regret, that this conviction cannot stand. The Act of Geo. III. has been extended by the Act of 1846, and protection is given to all persons assembled for religious worship, whatever their views may be. We have seen too much in these Courts of evils of this kind to desire that it should be thought that we in any way countenance such conduct as, on the appellant's own admission, he was guilty of—going into a religious assembly with his hat on, and using violent language in the presence of the congregation. But there is a principle of our criminal law which we think has been violated in this case—namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have been very foolish and unfounded, but that defence ought to have been put before the jury—this is a paramount principle of our criminal law—so that they could judge whether, in doing what he did, he was "wilfully and maliciously" or "contemptuously" disquieting or disturbing the meeting. Mr. Wethered has said that even assuming he was an officer of the church and had a right to object, he did it in such a way that he was rightly convicted. But the question in that case for the jury would have been whether he had done it in a "contemptuous" way or "wilfully and maliciously." The Recorder no doubt felt very strongly that appellant's conduct had been improper, but from the beginning to the end of the trial the appellant's defence was not put before the jury; and under the circumstances we think that the conviction must be quashed. Upon the other question raised by the defence, as to the form of the sentence, we desire to express no opinion.

Conviction quashed.

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John Armitage.

JOHN ARMITAGE.

"No substantial miscarriage of justice" within the proviso to sect. 4, *sub-sect.* 1 *of the Criminal Appeal Act,* 1907.

This was an appeal, by leave of Bucknill J., against a conviction at Derby Borough Quarter Sessions, on October 21st, for obtaining credit by fraud otherwise than by false pretences (under sect. 13 of 32 & 33 Vict. (Debtors Act, 1869), s. 13), and an application to call further evidence. Appellant was sentenced to nine months' imprisonment with hard labour.

Appellant, who described himself as a Canadian farmer, staying at the St. James's Hotel, Derby, walked into a jeweller's shop on September 18th and obtained a ring of the value of 12*s.* 6*d.* without paying for it, upon the representation that he would return it upon the following Monday afternoon, when he arranged to come and purchase a much more valuable ring, worth about 20*l.*, which the jeweller was in the meantime to procure for him. He did not keep the appointment, but instead of doing so he kept and pawned the ring.

Harold Wright for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present, asked for an adjournment to call the jeweller's assistant, who was in charge of the shop when appellant called on the morning of the day fixed for the appointment, but the application was not granted. Counsel argued that it had not been shewn that credit was obtained, and this was an essential ingredient of the offence for which he had been convicted. In the conversation with Evans, the jeweller, appellant said: "You now have my name and address; I will take the ring," to which Evans replied that he might take it, and he (Evans) would be pleased to receive it back on the Monday, not charging him for it, in view of a better sale. That was the agreement; and Evans further said: "I did not expect to receive any money on the ring, but on the transaction on Monday."

Appellant was committed by the magistrates for larceny by a trick, but this charge and that of obtaining the ring by false pretences were not gone into.

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[The Lord Chief Justice: There is abundant evidence of fraud in obtaining the ring; the question is whether he obtained credit by fraud.]

Condy, for the Crown. There was an obtaining credit by fraud. If the jury believed what was said he got this ring on credit; when he went away with the ring the arrangement was, "keep it till Monday morning, if you then buy another I will take this back," and if there was any understanding of credit in the transaction it comes within the provisions of sub-sect. 1 of sect. 4 of the Criminal Appeal Act, 1907. There were several previous convictions against appellant.

The Lord Chief Justice: There is something to be said in favour of the technical view raised by the defence, although some of the evidence given by the prosecutor might bring appellant within sub-sect. 1 of sect. 13 of the Act of 1869. But we are clearly of opinion that this case comes within the provisions of sub-sect. 1 of sect. 4 of the Criminal Appeal Act, 1907. There is abundant evidence that prisoner ultimately obtained the ring by fraud. There was strong evidence that he had stolen the ring. In our opinion there has been no substantial miscarriage of justice, and the appeal must be dismissed. The sentence will run from the date of conviction.

Appeal dismissed.

WILLIAM GEORGE BOLSTER.

William
George
Bolster.

A jury may convict on slight evidence of a common design.

This was an appeal, by leave of Bucknill J., against a conviction, at Hants Quarter Sessions, on October 19th, for larceny of three shillings.

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William George Boister.

Appellant was sentenced with a co-prisoner named Bunce (who was bound over) to eight months' imprisonment with hard labour.

W. E. Lloyd for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. There were two indictments against appellant and Bunce (who pleaded guilty to both), and after being acquitted on the first, of stealing fourteen shillings, he was tried by the same jury on the second charge of stealing three shillings. The evidence against him in the second was even slighter than in the first. He had entered a public-house with Bunce, who subsequently stole the money, but there was no evidence to shew that he was acting in concert with Bunce. Appellant had not been seen to leave the public-house with the other prisoner, and in fact at the time when the latter stole the money, he was out of the house looking after a bicycle.

Spranger, for the Crown, submitted that there was ample evidence on which the jury could convict.

Bucknill J.: This appeal must be dismissed. We think it is quite clear that there was evidence to go to the jury that these two men were acting in concert. They entered the public-house together, and they were seen together afterwards. We think they were both properly convicted.

Appeal dismissed.

John Smith.

JOHN SMITH.

Severity of sentence.

This was an appeal, by leave of Bucknill J., against a sentence of five years' penal servitude passed, on October 19th, at the St. Alban's Quarter Sessions for larceny of a watch from the person.

Appellant was not present, but had sent in a written statement.

Harvey Murphy, for the Crown.

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John Smith.

DARLING J.: This man is a habitual criminal, as is shewn by his previous record. In 1892, 1896, 1897, and 1898 he was convicted of larceny; in 1900 and 1902 he was convicted of assault; in 1905 he was convicted of wounding with intent to do bodily harm and sentenced to five years' penal servitude. The appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE CHANNELL.

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Abel
Atherton.

ABEL ATHERTON.

Murder—The Court will not review a verdict when the defence of accident has been properly put before the juru.

This was an application for leave to appeal against conviction for murder, at the Durham Assizes, before Walton J., on November 11th. Appellant was sentenced to death.

M. P. Griffith Jones, for appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was not present. The jury were prejudiced against appellant at the trial, and their verdict was against the weight of evidence, which at most only disclosed manslaughter. The facts of the case were these:—

Appellant, who was a miner, had during the past two years lodged with a Mr. and Mrs. Patrick, and Mrs. Patrick had shewn great kindness to him. Appellant had fallen in love with their daughter, who objected to him. He was of a very jealous disposition, and put an entirely wrong construction upon the affectionate relationship of father and daughter. Accordingly, on July 24th, the daughter said either he or she must leave the house, and from that date he lodged elsewhere, but until the death of the deceased (August 11th) he remained on terms of friendship with the family and was in the habit of daily visiting the mother. Upon August 11th, as he was talking to the mother in the afternoon, the daughter entered, and appellant observed, "Hello, here's daddy's pet." He then undertook to fetch the father, who was working in a pit two miles away, to prove the truth of his accusations; but before he left the house he said he would "do for" the daughter and the mother. He shortly afterwards returned with a gun

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under his arm, and a struggle took place with the mother, who was shot.

Appellant was clearly under the influence of drink, and when he went out of the house, his intention was to take the gun to a man who had a few days previously arranged to buy it, and upon his way there, he went into the Patricks' house again with the loaded gun under his arm, to frighten them. This was borne out by his statement to Inspector Dryden. There were three witnesses of the struggle in the house, viz., Miss Patrick, Mrs. Marley, and Joseph Patrick, the son, who were all agreed that the struggle took place in a small narrow passage as indicated on the plan [produced]. An inspection of the plan shewed how the position of the parties in the struggle became reversed.

The plan was examined by the Court.

[CHANNELL J. (looking at the plan): The parties struggling are in the lobby, while the witnesses are in the room.]

The struggle began in the doorway of the kitchen. When appellant entered, Mrs. Patrick jumped up and rushed at him, and got hold of the gun by the barrel-end.

[DARLING J.: How do you account for the second shot? Prisoner's own account is that she took the gun away from him.

The LORD CHIEF JUSTICE: The evidence shews clearly that there was a perceptible interval between the first and second shot.]

The two shots were not fired quite instantaneously, but all of the witnesses were agreed that the shots went off during the struggle when Mrs. Patrick seized the barrel. Not one of the witnesses spoke to appellant's pointing or firing the gun, at any time, at Mrs. Patrick. If he went into the house without an intention to injure anyone, the verdict should have been "not guilty"; and if he went in with some other intention, then the verdict should have found manslaughter, as the onus was on the Crown to prove intent to murder Mrs. Patrick.

[The LORD CHIEF JUSTICE: Do you ask us to reject the evidence of his previous attempt to obtain a revolver?]

At the trial that point was not dealt with seriously. Appellant stated he wanted the revolver for poaching purposes.

The verdict was a wrong one; the jury were prejudiced by appellant's shocking suggestion and evidence of attempted immorality on his part.

[Channell J.: The jury came to the conclusion upon the facts that he was a man likely to commit the offence.]

After the verdict, the judge received a communication.

[The Lord Chief Justice: We have considered it most carefully. A gentleman who happened to be in Court suggested how the act might have happened.]

Counsel requested leave to shew the gun to the Court, and explained he had a theory how the shots were fired. The gun was then handed to him.

[Channell J.: If the gun was in the inverted position in which you are holding it, I cannot see how the trigger could have gone off twice.]

Counsel then described to the Court how he suggested that the gun was first held, and how subsequently in the struggle the position of the gun was reversed and the trigger accidentally pulled.

[Darling J.: But appellant himself says that did not happen, and the doctor's view is different.]

I ask your Lordships not to press the point that the appellant gave false evidence in the witness-box.

Laurie, for the Crown, was not called upon.

The Lord Chief Justice: Counsel for the defence has said everything that could be said on behalf of the appellant. It is quite impossible for us to say there was improper reception of

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evidence, or that the circumstances mentioned by counsel should have been shut out from the case.

I will not deal with the improbabilities of the story, but it does seem to us—in view of the fact that the two discharges of the gun were at some interval of time, and having regard to the improbability of a woman being able to hold a gun in such a position and at such a distance, and remembering the revolver incident—that the possibility of accident is quite remote, and in order to justify the defence now set up it is necessary to reject the prisoner's own story.

It is quite clear that there was a wilful attempt to shoot some one, and we are of opinion that it was to shoot the mother; and the jury found their verdict after a proper direction and after hearing full argument.

It is not possible to give leave to appeal against this conviction.

Application dismissed.

Thomas
Smith
(Hereford).

THOMAS SMITH (Hereford) (*a*).

Identification by handwriting. The Court does not necessarily consult experts, and will look at writing by appellant made since conviction.

S. R. C. Bosanquet for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present.

On 22nd June Farmer Bound sold his mare at Brampton Bryan Fair to a man who wrote what purported to be his name on a piece of paper, "Davies, Corn Dealer, Ludnow," and paid him by a cheque for 15*l.* 5*s.*, signed "J. Davies." The cheque was worthless. The sole question was one of identity.

Two of the three witnesses who swore they recognised appellant, viz., Farmer Bound and another farmer, were not called upon to identify him in the usual way, and Farmer Bound, when asked in Court if he had any doubt as to appellant being the man, said: "No doubt about him. I have made it a matter of prayer."

(*a*) See p. 73, above.

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(Hereford).

[The LORD CHIEF JUSTICE: He meant he was very anxious.]

In cross-examination, when shewn a photograph of a different person, who, the defence alleged, had committed the offence, and asked if the man was like that, he at first declined to answer the question, but subsequently admitted there was some resemblance.

The third witness, the police constable, swore to having seen appellant in company with the prosecutor, and that when he first saw him in the morning he was wearing a black hat and carrying a stick, and that in the afternoon he was wearing a brown hat and carrying a whip. He also stated that he saw him in Bucknell village at 7 o'clock in the evening.

On the other hand, witnesses swore appellant left Bucknell by train that afternoon about 5 o'clock. There was no evidence he got back there, and the time tables shewed that it was impossible to get back as had been suggested. The witnesses, all most respectable men, swore that appellant was with them at the time the offence was committed, and also that he was wearing a brown hat all the day. The horse was never traced at all, and the cheque was never traced to the appellant. The constable's evidence must be scrutinised carefully. Appellant admittedly was at the Fair, and the constable, having seen him there and knowing his previous career, would naturally jump to the conclusion that he was the man wanted. A certain name had been mentioned as the offender's, but there is a third alternative that both the witnesses for the defence and the prosecution were mistaken. And on that point the learned Chairman, Sir Richard Harington, misdirected the jury by not putting the alternative. The shorthand note of the trial is a most imperfect one.

The character of my witnesses was attacked by the learned Chairman, who said: "All these witnesses are horse-dealers, but there is no reason on the evidence to suggest that they are otherwise than honest *for that class of men!*"

[DARLING J.: He did not mean that as an attack.]

In face of the conflict of evidence in this case the handwriting is of very great importance. [The photographs of the cheque and the piece of paper were then handed up to the Court and compared with specimens of appellant's handwriting previously taken at the trial.] It is suggested that the appellant disguised his handwriting, but his writing is different in every way from that on the cheque and piece of paper. The latter is a cursive handwriting, and no single letter or word has any resemblance to the other writing. The letters "D" and "v," particularly, are formed quite differently in "Davies." One characteristic persists throughout appellant's handwriting—the pen is taken off the paper after every single letter.

No one, looking at that handwriting, could say they were written by the same man. The learned Chairman, in his summing-up, gave the jury no guidance how they were to examine the handwriting. They were not competent to come to a correct conclusion without some assistance.

[DARLING J.: Prisoner wrote "Davis" instead of "Dav*ies*."]

Yes; the man who wrote the cheque and piece of paper spelt the word differently.

A letter from the prisoner written from prison since the conviction was put in.

Lawrie, for the Crown: The documents are before your Lordships, who are, of course, competent to pass an opinion upon the handwriting. The evidence clearly indicates that the appellant wrote the cheque, and although there was no suggestion that there were any confederates, yet it was clear that the jury put more credence in the witnesses for the prosecution than those for the defence. At the trial the man's hands were noticeably shaky.

The letter which had been just put in from appellant was then carefully considered by the Court.

The LORD CHIEF JUSTICE. We have had from time to time to consider questions of handwriting, and we should regard with some suspicion specimens of handwriting written for a particular purpose, which a man frequently disguises. In this case, however, the man who wrote the words on the small piece of paper also wrote the cheque; and it appears to the Court that the prosecution did make the identity of the man who wrote the cheque and that piece of paper with the appellant an essential part of their case.

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Thomas Smith (Hereford).

We are, therefore, in as good a position as the jury to judge by mere comparison of handwritings. Was it essential to the prosecution to prove, or to the defence to disprove, the writing of the cheque? The prosecution alleged that the cheque had been written by appellant. One would not think that the idea of disguising his handwriting would have entered a man's mind first of all at the trial. But we have also now before us specimens of appellant's undoubted handwriting both upon the notice of appeal and written from prison since the trial. We have most carefully compared the two handwritings, and this Court does not think that a man of his education could successfully keep up these differences, involving not only curious strokes and curious formation of letters, but even different spelling.

There is also a further element in this case as reported (we unfortunately have not got an accurate shorthand note), that these differences in handwriting do not appear to have been clearly dealt with at the trial. The identity of the handwriting seems to us to be an essential part of the case for the prosecution, and we therefore think it would not be safe to allow the conviction to stand.

Conviction quashed.

Thomas Smith (Lincoln).

THOMAS SMITH (LINCOLN).

Severity of sentence.

In passing the primary sentence, regard should be had to the term of preventive detention.

This was an appeal by leave of Bucknill J., against conviction at Lindsey Quarter Sessions on October 22nd, for larceny of one iron plough and one iron scarifier, the property of William Wilkinson. There was also an appeal against the sentence passed on him of five years' penal servitude followed by five years' preventive detention.

Lipson Ward for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. The verdict was against the weight of evidence, there was no direct evidence of the larceny, but the prosecution relied on the doctrine of "recent possession," and the summing-up of the judge was wrong in law.

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Thomas
Smith
(Lincoln)

The plough was stolen from prosecutor after April, and sold by appellant in July, but not missed until September, so the doctrine of "recent possession" did not apply. Appellant named the person from whom he bought it, viz., one Lawton, and the onus was on the prosecution to shew this was not true; Lawton admitted selling a plough to appellant in May. Appellant had a plough, but he never had a scarifier, and he never sold one.

[CHANNELL J.: You have different ploughs, one bought and one sold by him.]

There was only one plough in the case, viz., the plough sold to appellant about May by Lawton, which appellant subsequently sold to Ingoldby. The person who bought the plough was not called as a witness.

Then I submit that either Wilkinson must be mistaken when he identifies the plough—in which case the prosecution fails—or, if it was his, appellant gives a reasonable account of his possession, and the onus of proof is on the prosecution. When inquiries were made at appellant's house, he immediately went to the police station, and stated he had got the plough from Lawton.

As for the scarifier, Wilkinson, when asked if he could identify the "scarry," said: "Yes, I had a new end put on her only about two years ago, a new end and a new wheel." The other witness was unable to identify it. No jury ought to have convicted upon such slight identification. Further, the evidence that the scarifier was ever in appellant's possession is unsatisfactory. Smith, who helped to take the plough, and Ingoldby swore that there was no scarifier with it.

Counsel then read passages from the summing-up of the Chairman. The jury were not told to give prisoner the benefit of the doubt. The learned Chairman suggested to the jury that the onus of proof lay on the defendant when he said: "If you are of opinion the prisoner's defence and his witnesses are not sufficiently strong to *rebut* the charge made against him, then it will be your duty to convict him of the offence."

[CHANNELL J.: That depends on what you understand by "rebut."]

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Thomas Smith (Lincoln).

With regard to the sentence passed upon appellant, while it was true he was a habitual criminal, yet it would be better for him and everyone else if the sentence were reduced and the preventive detention brought nearer.

A. Moresby White, for the Crown, was not called on.

CHANNELL J.: In this case satisfactory evidence as to the identity of the plough and scarifier was given by the witnesses for the prosecution. As for the plough, Ingoldby's memory may have been at fault, but there was no evidence that the plough sold to Ingoldby was sold by Lawton to appellant, and when a prisoner does set up an affirmative case he almost necessarily must stand or fall by it. As to the suggested misdirection, it is not an invariable rule that juries must be told to give the prisoner the benefit of the doubt. In many cases it may be quite right to assume that they know that. They are told it over and over again by counsel, and a jury who try more than one case are usually told it several times by the judge. In the summing-up perhaps the learned Chairman was not quite accurate in the use of the word "rebut" in its strict meaning, but the jury may well have understood that word in the ordinary acceptation. With regard to the sentence imposed, the Court are of opinion that the sentence is rather excessive in view of the preventive detention for five years. The sentence will therefore be reduced to three years' penal servitude, to be followed by the five years' detention, and to run from the date of the trial.

Sentence reduced.

John Clay.

JOHN CLAY.

Misdirection—"Felonious intent" not explained properly to the jury.

This was an appeal, by leave of Bucknill J., against conviction, at the East Riding of Yorkshire Quarter Sessions on October 19th, for larceny of a horse. Appellant, who was sentenced to fourteen days' imprisonment with hard labour, was allowed bail, on his own recognisances, pending this appeal.

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John Clay.

W. H. Owen for the appellant (under sect. 10 of the Criminal Appeal Act, 1907). Appellant had originally sold the horse in question to the prosecutor, and asserted that part of the purchase-money was still unpaid. This was denied by the prosecutor, and appellant thereupon threatened to fetch the horse back, and did, in fact, take it out of prosecutor's field. The question was whether he had a felonious intent. Of this no evidence was given at the trial. The Chairman's summing-up was insufficient.

H. S. Moss-Blundell, for the Crown: I am unable to contend that the conviction is altogether a satisfactory one, but I opened clearly to the jury the question of *animus furandi*, and even if the Chairman did not deal with the point adequately in his summing-up, it was before them. I cannot contend that the summing-up is adequate. Probably the Chairman did not think that the jury could possibly convict after what had passed, and hardly considered a summing-up necessary.

The LORD CHIEF JUSTICE: This is a kind of case in which, even before the Criminal Appeal Act, an appeal would have been allowed. On a proper summing-up we think there could not have been a conviction. We do not think that there was any evidence of a felonious intention, or that the jury were properly directed as to "felonious intent." The conviction must be quashed.

Conviction quashed.

CHARLES WERNER AND CHARLES COOKES.

Charles Werner and Charles Cookes.

Pending charges against appellants will not be taken into consideration by this Court (and should not by the Court of trial) in passing sentence unless they consent—Severity of sentence.

At Kingston Quarter Sessions on October 20th, Werner, who pleaded guilty to the charge of receiving two snuff-boxes and other articles the property of Sir John Brunner, was sentenced to five years' penal servitude, and recommended for deportation.

Cookes, who pleaded not guilty to the same charge, was convicted, and sentenced to seven years' penal servitude, and recommended for deportation.

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Charles Werner and Charles Cookes.

Werner appealed from the order of Bucknill J. refusing him leave to appeal against sentence, and legal aid; and Cookes appealed by leave of Bucknill J. against sentence, and from the order of that learned judge refusing leave to appeal against conviction, and legal aid, and applied for leave to call further evidence.

Appellants in person. Werner, through a German interpreter, pleaded that he was in great distress; and Cookes denied that he had received the stolen property with guilty knowledge.

A. J. Lawrie, for the Crown: Before sentence was passed on the prisoners Superintendent Albert Taylor informed the Court: "I hold here two warrants against these prisoners. They broke into a place on the 20th August and stole about 100*l.* worth of stuff, and on the 27th August they broke into another place, and also stole goods worth about 100*l.* The very bag in which they were carrying the stuff [the subject of this charge] at Chertsey was a bag stolen on one of these occasions. Will you take these two warrants into consideration when passing sentence?" The Chairman took these alleged burglaries into account in passing sentence.

[CHANNELL J: Ought appellants not to have been asked whether they consented to their being taken into account?]

There were three previous convictions for burglary against the prisoner Cookes, and Werner had been imprisoned for forty months in Germany for larceny.

The Court asked appellants whether they were willing to have the outstanding charges against them taken into account now, explaining that if they did not they were liable to be tried and punished for them pending the present sentences; but it appeared that Werner did not consent. Cookes did not admit the charges in question, and did not wish the Court to deal with them.

The LORD CHIEF JUSTICE: Werner completed a sentence of three years and four months' imprisonment in Germany on the 12th March last for larceny. Cookes has a very bad record. In 1903 he was sentenced to twelve months' imprisonment with hard labour for burglary. In 1904 he was sentenced to twenty-one months' imprisonment with hard labour for attempted burglary.

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Charles Werner and Charles Cookes.

In 1905 he was sentenced, for burglary and larceny, to three years' and six months' penal servitude. With regard to the warrants, the prisoners clearly did not admit these offences, but the Chairman said something about taking those charges into account, but as they did not admit them he could not, and they are not taken into consideration by this Court. We think that the sentences of five and seven years respectively passed upon them are not too severe on the merits. But we also think that the other charges should not be further prosecuted.

Application and appeal dismissed.

JOHN COOPER.

John Cooper.

Severity of sentence.

This was an appeal against sentence on October 23rd, 1909, at the Middlesex Sessions of twelve months' imprisonment with hard labour for larceny of a fowl. Leave was given by the full Court on November 12, when appellant applied in person for leave to appeal against the conviction (which had been refused by Bucknill J.), as the Court thought that in view of appellant's age it was desirable that the prosecution should be represented in order to inform the Court of his previous career.

Appellant, in person, said that he had always been a hard-working man, and that the sentence was excessive.

Belgrave, for the Crown: There is one previous conviction for poaching against appellant and some summary convictions. I think the learned Chairman was rather influenced by a detective who gave him a bad character. He has been in prison from the time the offence was committed on the 31st August.

The LORD CHIEF JUSTICE: In this case there had only been one small previous conviction on indictment, and having regard to the fact that appellant has been two months in gaol, and that, upon

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John Cooper.

the evidence, he is not a mere idle loafer, but endeavours to work, we think that the sentence is rather too severe. The sentence will therefore be reduced to six months' imprisonment without hard labour.

Sentence reduced.

Louis John Islip.

LOUIS JOHN ISLIP.

Severity of sentence—The Court discourages the infliction of imprisonment with hard labour and penal servitude in the same sentence.

This was an application for leave to appeal, referred by Bucknill J. to the full Court, against a conviction at Middlesex Sessions on October 28th, for obtaining goods and money by false pretences from several firms and individuals, and also for obtaining credit by other frauds (within sect. 13 (1) of the Debtors Act, 1869, 32 & 33 Vict. c. 62). There were fifty-two counts in the indictment, but some of them were dropped to shorten the proceedings. There was also an appeal, by leave of Bucknill J., against the sentence of two years' imprisonment with hard labour, to be followed by five years' penal servitude.

R. S. C. Nolan for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was convicted on three charges, which alleged that he had obtained 15*l.* from Kate Shelley and goods from certain tradespeople by certain false pretences. He was also charged, under sect. 13 of the Debtors Act, with incurring a debt or liability to the same persons by means of fraud other than false pretences.

The alleged false pretences, in the case of Kate Shelley, were: (a) that he was carrying on a *bonâ fide* business as a letter of apartments; (b) that he received, between the first day of January and the first day of December, 1908, the sum of 75*l.* in such business; (c) that all his rooms on a given date were let; (d) that he was a person of means, credit and respectability.

It was contended that his ledger account, which was put in by the prosecution, from January 1st, 1908, to December 1st, 1908, shewed he had only received 50*l.* for letting his rooms, whereas he contended that it shewed 100*l.* In answer to this the Chairman told appellant that he should call the boarders who had actually paid him. It is submitted that as the prosecution put in the ledger they were bound by it, and there was no obligation on appellant to call the boarders to prove the specific sums. There was, therefore, no evidence of false pretences on this ground to have been left to the jury. The correspondence between Kate Shelley and himself contained the contract he had entered into with her.

Appellant had advertised for—

> "HOUSEKEEPER. Lady wanted, premium 10*l.* One-half share of apartments in large house. 45, The Avenue, West Ealing."

This premium was subsequently raised to 15*l.* The first letter contained a proposal to give her one-half of all money received for rent of rooms at "The Avenue" until it reached 26*l.* per annam, and then 6*s.* 8*d.* in the pound.

It is true he suggested she would have no difficulty in making 40*l.* a year, but he did not guarantee this amount in definite terms.

In a later letter he says—

"Of course, do not fail to accept an engagement should one seem desirable. In reply to your questions I would guarantee the 26*l.* The rooms made 75*l.* up to December last."

He had in fact let up to about 75*l.*, and the business of lodging-house keeper was a very precarious and uncertain one. Mrs. Shelley had not succeeded in her business at Scarborough, and was looking out for something to do. He may have indicated to her that the business was rather more flourishing than was the case, but there was a business. So that the facts of the case did not justify a charge of false pretences. It is not like the case of *Cooper* (*a*), where defendant had obtained goods on the strength of a business which did not exist.

The false pretences alleged in the dealings with tradespeople disclose no misrepresentation of an existing fact.

[The LORD CHIEF JUSTICE: He said that he could introduce a Captain Robertson Seymour, a man of good social position, and that he himself was a member of the Cocoa Tree Club, as well as

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(*a*) See p. 71, above.

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a member of the Junior Turf Club. Is that not a false representation of an existing fact?]

The last two statements were not made in regard to the charges on which he has been convicted of false pretences. There was no evidence that anything he said influenced the prosecutors to give him credit for the goods.

[The LORD CHIEF JUSTICE: Having regard to all these transactions, which were upwards of twenty, do you say there was no evidence?]

The circumstances were similar in nearly all of them, but the facts were not sufficient to constitute fraud. The use of note-paper with a printed address does not do so. In nearly all these cases goods were sent merely on an order written upon note-paper with an address—the correct address—that impressed tradespeople as respectable.

In one case it was put against appellant that he wore a top-hat and a frock-coat, and thereby created the impression that he was a man of means, but he was bound to wear some clothes. It was not like wearing a uniform, as in *Barnard*, 7 C. & P. 784 (1837); yet the Chairman cited this case, in summing up, as analogous. That was a misdirection.

Appellant's sentence was quite out of proportion to the offence These people—the tradespeople—parted with their goods, and he did not agree to pay at once for them.

Lawrie, for the Crown, did not justify the form of the sentence It was legal but quite unusual to impose hard labour before penal servitude. The case, however, shewed a systematic course of fraud.

Nolan, in reply: The circumstances were not exceptional, and the sentence was very exceptional.

The LORD CHIEF JUSTICE: In this case the trial before the learned Chairman was a very long one, and if you take some of the cases separately it might be said that the evidence of fraud was slight. But if ever a case of system was established, it i established here. There is an obtaining a considerable amount o money and goods, and the jury have convicted him upon all th counts. I rather agree with his counsel that if you were to pick out some of the cases it might be difficult to say that the case is altogether satisfactorily proved against him, but when you have a long series of cases, as here, it is quite impossible for us to say that any substantial injustice has been done.

In Mrs. Shelley's case prisoner represented that the previous year he had made 75*l.* or 85*l.* by the rooms. Mrs. Shelley described the people who had stayed a night or two in the house and paid a couple of shillings. There was, in fact, no substantial business at all.

In the case of the Wholesale Wine Association, prisoner stated that he was in a position to introduce a large business to them. It is possible that some of his representations were not made till after he obtained the goods, but the fact remains that he was going about making representations, as alleged by the prosecution, of a sufficiently substantial nature to go to the jury.

There is not the slightest ground to interfere with his conviction, but with regard to the question of sentence the Court takes a more lenient view. It is quite proper that, in the circumstances of the case, a long sentence should be imposed, but we think that two years' imprisonment with hard labour, followed by five years' penal servitude—or seven years in all—should not be imposed.

In *Max Albert Martin*, (1908) 1 Cr. App. R. 209, this Court said that it is not usually desirable that penal servitude and hard labour should be imposed together, as it is difficult for a prisoner in these circumstances to get good marks. The Court inflicts a sentence of five years' penal servitude on the counts in respect of which penal servitude can be imposed, and one day's imprisonment on those in respect of which imprisonment only can be ordered.

Sentence reduced.

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Charles Thomas Cooper.

CHARLES THOMAS COOPER.

A jury may infer embezzlement from non-receipt of moneys.

The Court will not entertain a defence of payment over of money not set up at the trial.

This was an appeal against conviction, at Kesteven Quarter Sessions on October 19th, for embezzling in June and July sums of 5*s.*, 2*s.* and 3*s.*, the property of Horace George Green.

A certificate of appeal was granted by the Chairman on grounds of law, viz., that the non-receipt of the money had not been proved by the prosecutor, and that the jury had not been directed in the summing-up on the defence that as the prosecutor had agreed to treat the matter as a civil one, there was no felonious intent.

Appellant, who was on bail, also applied for leave to appeal against his conviction and sentence of six weeks' imprisonment with hard labour, his application having been referred to the full Court by Bucknill J.

T. D. Lawrance for appellant (under sect. 10 of the Criminal Appeal Act, 1907). Appellant was employed by Green, a baker carrying on business at Welbourn, Lincolnshire, as an assistant in the bakehouse and also to go round with the cart, taking a book with him in which he entered all the transactions with customers, shewing what he sold and what money he took on the round. The customers also had their own books, in which the corresponding amounts were entered.

In the first case he was charged with embezzling 5*s.*, paid to him by a Mrs. Doughty on June 5th, which sum was entered in her book by him, but did not appear in his employer's "round" book, and was not paid to the prosecutor.

In the second and third case the facts were the same. Mrs. Kelly's book shewed by an entry on July 17th that 2*s.* had been handed over to him. Mrs. Franklin's book shewed, by an entry on July 24th, that 3*s.* had been paid to him. In all three cases appellant had omitted to enter these sums in his employer's book, and he had not handed them over to Green. But he was never in the habit of paying money to Green. It was his custom to pay it to prosecutor's wife, as was admitted by the prosecutor himself at the trial, who, in answer to the question

"He never paid his money directly over to you?" said, "He always brought it to my wife." Prosecutor admitted that he had known him bring in 2*s.* more and 3*s.* 6*d.* less than he could account for, and said he did not bother about small sums. On one occasion appellant told Green he was 10*s.* short, and said he had received two half-sovereigns, and he must have either lost one or given it in change for sixpence, and no entry of this transaction appeared in Green's book.

The prosecutor in reply to the appellant who asked him whether 30*l.* would cover his losses, answered, "It would not, but I would accept it." Appellant subsequently wrote a piece of paper promising to pay the 30*l.* in a fortnight, if Green did not prosecute. That may be evidence of a general deficiency, but there is no evidence to connect it with any of the three sums charged in the indictment.

As to his statement to the constable who arrested him, "I admit having had the money," that refers to the sums from Mrs. Doughty, Mrs. Kelly, and Mrs. Franklin. No witness was called to prove that appellant had not handed over these sums to the prosecutor's wife. This point was taken before the magistrates and at the trial.

[The LORD CHIEF JUSTICE: But appellant never says that he paid it.]

The prosecutor's wife was not called and her evidence was most material in the case. She was the only person who could prove that these sums had not been handed over.

[CHANNELL J.: You cannot now set up that the money was paid; appellant did not give evidence at the trial of payment over. There was no suggestion made that the lady had received the money. You have not applied to call the wife.]

It was for the Crown to call the wife. The prosecution may have had a good *primâ facie* case against appellant, but they had not put the case properly.

At the trial the learned Chairman harshly commented on the evidence:—"If you do not believe it was not a slip of the memory, if you believe that he did offer to pay, if he could find the money, the 30*l.* to Green, and that when the police sergeant arrested him

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he said 'It's all right, but I didn't take as much as Green thinks'—if you do not think these things are sufficient to prove him guilty, and that it was a slip of the memory, and that he offered to pay the 30*l.* to prevent proceedings being taken, then you must return a verdict of not guilty."

This fails to put the contention of the defence fairly to the jury.

A. J. Lawrie, for the Crown, was not called upon.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GRANTHAM,
AND MR. JUSTICE CHANNELL.

EDWARD TURNER (*a*).

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Procedure on the trial of an indictment as habitual criminal. Consideration of s. 10 (4) *of* 8 *Edw. VII. c.* 59 (*Prevention of Crime Act*, 1908) :—"*In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again :*

"*Provided that a charge of being a habitual criminal shall not be inserted in an indictment—*

"(*a*) *Without the consent of the Director of Public Prosecutions ; and*

"(*b*) *Unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge ;*

And the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

Held :— *Where the accused pleads guilty to the primary charge, the jury may be sworn on the second, as for a felony or a misdemeanour.*

Where "the consent of the Director of Public Prosecutions" is contained in a document purporting to be signed by him, such signature must be proved.

There must be proof of the receipt, and in due time, of the notice to the "proper officer of the court."

Secondary evidence, without notice to produce, may be given of the contents of the "notice . . . to the offender," and without proof of such notice the statutory previous convictions cannot be proved.

The words "seven days" mean seven clear days.

In specifying "the other grounds" there is no obligation to state the evidence on which the Crown relies to prove "dishonest or criminal life"

(*a*) This report is substantially a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

within sect. 10, sub-sect. 2 (a), but the grounds on which it is intended to found the charge must be given in a real and substantial form.

Evidence of such "dishonest or criminal life" before the last conviction is not necessarily inadmissible, but it must be brought down to the date of the pending charge.

It must be proved to the satisfaction of the jury that the accused was over sixteen years of age when the first statutory conviction took place, but such proof may consist in their view of the accused.

The sentence on the primary charge should not be pronounced before the trial of the charge of being a habitual criminal.

Case stated under sects. 1 and 2 of 11 & 12 Vict. c. 78 (the Crown Cases Act, 1848), by the Chairman of the Court of Quarter Sessions (J. W. Willis Bund, Esq.) for the County of Worcester.

The offence was committed on July 7th. Prisoner was sentenced on October 11th to three years' penal servitude and five years' preventive detention. He did not appeal.

"1. Edward Turner was indicted before me at the Michaelmas Quarter Sessions for the County of Worcester, on an indictment charging him in the first count with shop-breaking at Yardley, and in the second count under the Prevention of Crime Act, 1908, with being a habitual criminal.

2. On being called upon to plead he pleaded guilty to the shop-breaking. He was then called upon to plead to the second count, charging him with being a habitual criminal, and to that he pleaded not guilty.

3. The first question that arose was as to the procedure on the indictment. Sect. 10 (4) of the Act states that 'if on arraignment he [a prisoner] pleads guilty, or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again.'

4. As the prisoner had pleaded guilty to the offence with which he was charged, and no jury had been sworn, and pleaded not guilty to the offence of being a habitual criminal, it became necessary to swear the jury to inquire whether he was a habitual criminal or not. The section merely directs that it shall not be necessary to swear the jury again, but does not state if the jury have not been sworn on the previous counts of the indictment if the jury are to be sworn as for a felony or for a misdemeanor. Having regard to the fact that the original indictment was one for felony, I directed the jury to be sworn as in a case of felony. Was that a right direction?

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5. The section proceeds to say that—'Provided that a charge of being a habitual criminal shall not be inserted in an indictment (a) without the consent of the Director of Public Prosecutions; and (b) unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge; and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.'

6. The police superintendent was called, and proved that a letter from the Public Prosecutor containing a notice for service on the prisoner, and an authority for the prisoner to be charged as a habitual criminal, had been received at the Chief Constable's office. It was proposed to put the authority in evidence. It was objected that this authority was not admissible without the whole letter and contents, and also on the ground that the authority was bad in form, as it was not addressed to anyone and not produced by the right officer. I admitted it.

7. A notice sent by the Public Prosecutor to the Clerk of the Peace was tendered. It was objected that the officer who should produce it should be called and sworn and produce the notice sent to him. I admitted the notice without calling the Clerk of the Peace.

8. The superintendent was sworn, and stated that he served on the 4th October, 1909, the notice on the prisoner which had been sent down by the Director of Public Prosecutions. There was, however, no copy of this notice, and there was no evidence to shew what were the contents of the notice; and as no notice to produce it had been given to the prisoner, I refused to allow secondary evidence to be given of the contents of the notice so served.

9. The superintendent stated that the notice was served on the 4th October, and the Sessions were held on the 11th October. The section says that a charge of being a habitual criminal shall not be inserted unless not less than seven days' notice has been given. It was objected that seven days' notice had not been given in this case, and that it ought to be seven clear days. I overruled the objection.

10. An inspector of the Detective Department of the Birmingham Police produced a conviction dated the 22nd October, 1900, of the prisoner of warehouse breaking. It was objected that this con-

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viction was inadmissible in evidence as there was nothing to shew that it was one of the convictions which were specified in the notice on which the prosecution relied at hearing of the charge. I was of opinion that this objection was good, but in order that the practice might be settled I admitted the evidence and stated that I would give the prisoner every facility to appeal. The same objection was taken as to the other two convictions which were proved against the prisoner.

11. No evidence was offered that any notice had been given to the prisoner of the nature of the evidence the prosecution proposed to call to shew the prisoner was leading a persistently dishonest life. The superintendent of police was called to prove that the prisoner was leading persistently a dishonest or criminal life, and the superintendent stated that the prisoner had done no work except an occasional odd job. It was objected with regard to this that this evidence was not admissible on the ground that nothing could be given in evidence with regard to the prisoner's conduct but what had taken place since the last conviction, the words of the Act being 'that he is leading persistently a dishonest or criminal life,' and that they must refer to the life after the last conviction, and not to the life which he led before such conviction. I was of opinion that this view was correct, but considered that the question whether the evidence ought to be admitted should be the subject of appeal to the High Court as to its admissibility.

12. It was submitted by the defence that there was no case to go to the jury, as the Crown had not proved that the prisoner was more than sixteen when the first conviction took place; that the notice was bad in not specifying the convictions and other grounds to found the charge; that there was no evidence to shew that the prisoner had any opportunity of meeting the case, or of bringing rebutting evidence; that there was nothing in the notice specifying the other grounds upon which it was intended to found the charge; that the notice was out of time, and had not been properly proved. There was no evidence of the age of the prisoner either at the time of his conviction or at the time of his arrest on this charge.

13. I overruled these objections and left the case for the jury. The jury found the prisoner guilty, and the Court sentenced him to five years' detention as a habitual criminal. He has not appealed, and the time for doing so has now elapsed, and therefore I have stated this case for the opinion of the Court.

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14. A further point arose as to whether he ought not to have been sentenced to penal servitude before the indictment for being a habitual criminal was tried. I held that this was not necessary, and that both sentences might be pronounced together.

15. The questions of law for the consideration of the Court are:—

(1) Was the direction, that the jury should be sworn as in cases of felony, when the charge to which the prisoner had pleaded guilty in the indictment was felony, correct? or how should the jury be sworn?

(2) Was it necessary that the whole of the letter and all the contents received by the Chief Constable from the Director of Public Prosecutions should be put in evidence, or could one of the enclosures be put in evidence without the rest?

(3) Was it necessary that the Clerk of the Peace should be called and sworn to produce the original notice sent to him by the Public Prosecutor?

(4) Was I right in refusing to allow secondary evidence to be given of the contents of the notice served upon the prisoner?

(5) Was the service of the notice on the 4th October, the Sessions being held on the 11th October, a sufficient notice within sect. 10 of the Act?

(6) Was the conviction dated the 22nd October, 1900, or the other convictions proved admissible in evidence, there being no evidence to shew that they were the convictions mentioned in the notice?

(7) Was it necessary to prove that notice was given to the prisoner of the evidence to be called to prove he was leading a persistently dishonest or criminal life?

(8) Was I right in admitting evidence of the prisoner's dishonest or criminal life previous to the last conviction, or should the evidence be confined to proving that the prisoner was leading persistently a dishonest or criminal life since his release from prison after his last conviction?

(9) Was it necessary that evidence should be given to prove that the prisoner was over sixteen when the first conviction took place?

(10) Should the sentence on the first count of the indictment have been given before the prisoner was placed on his trial as a habitual criminal?

If the Court should be of opinion that on any of the above matters I was wrong in the directions I gave, or in admitting the evidence, the conviction will be quashed; if it is of opinion that in all the above matters I was right the conviction will stand."

SHIRE HALL, WORCESTER,
30*th October*, 1909."

R. W. Coventry for the prisoner (under s. 10 of the Criminal Appeal Act, 1890), who was not present. This is a case stated for the purpose of raising certain points under the Prevention of Crime Act of 1908. They are most of them points of practice and procedure, but there are one or two of substance on which on behalf of the prisoner I could rely.

This Act has caused difficulty as to certain points of practice and procedure, and if your Lordships would settle this matter it would be of great assistance.

CHANNELL J.: There were a great many points of considerable difficulty raised in a case before me, and I thought that the man in that case was going to appeal.

The case is this.

"Edward Turner was indicted before me at the Michaelmas Quarter Sessions for the County of Worcester, on an indictment charging him in the first count with shop-breaking at Yardley, and in the second count under the Prevention of Crime Act, 1908, with being a habitual criminal.

On being called upon to plead he pleaded guilty to the shop-breaking. He was then called upon to plead to the second count, charging him with being a habitual criminal, and to that he pleaded not guilty.

The first question that arose was as to the procedure on the indictment. Sect. 10 (4) of the Act states 'that if on arraignment he pleads guilty, or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again.'

As the prisoner had pleaded guilty to the offence with which he was charged, and no jury had been sworn, and pleaded not guilty to the offence of being a habitual criminal, it became necessary to swear the jury to inquire whether he was a habitual criminal or not. The section merely directs that it shall not be necessary to swear the jury again, but does not state if the jury have not been sworn on the previous counts of the indictment if the jury are to be sworn as for a felony or for a misdemeanour. Having regard to the fact that the original indictment was one for felony, I directed the jury to be sworn as in a case of felony. Was that a right direction ?"

There is no doubt that would be a perfectly right direction, because the greater would include the less. It is a small matter, but the jury had not been sworn.

GRANTHAM J.: How should they have been sworn?

I do not know.

GRANTHAM J.: They must be sworn—they are sworn as in a felony. That covers the other.

CHANNELL J.: It was a felony, the principal thing that he pleaded guilty to.

That was so.

CHANNELL J.: If it was a misdemeanour it probably was not necessary to swear as for a felony. It is only a mode of punishment, it is not made a felony.

The same point might have arisen under the Larceny Act, because although it purports to deal with all alternatives it leaves out this particular alternative in that Act. That is sect. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). That is the method of dealing with previous convictions of felony.

CHANNELL J.: It might happen that he pleaded guilty, and nevertheless said he was not the man previously convicted.

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That might be so, and the question might have arisen on inquiring whether he had been previously convicted, whether the jury would be sworn for misdemeanour or felony. The same thing would arise under the Inebriates Act (61 & 62 Vict. c. 60, s. 1 (2)); the same procedure would be adopted there, but this particular alternative is omitted from all three Acts. I do not think it can depend, as Mr. Justice Channell suggested, upon what the original crime was.

CHANNELL J.: Does it not? Why not?

Under this Act the original crime might be a misdemeanour, or it might be a felony, but the inquiry whether a man is a habitual criminal is not stated to be either a misdemeanour or a felony.

CHANNELL J.: No; therefore what he is ultimately convicted of is that original offence with circumstances of aggravation which do not alter it from being a felony or misdemeanour, whichever it is.

Then

"The section proceeds to say that—'Provided that a charge of being a habitual criminal shall not be inserted in an indictment (a) without the consent of the Director of Public Prosecutions, and (b) unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender that it is intended to insert such a charge; and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.'

"The police superintendent was called, and proved that a letter from the Public Prosecutor containing a notice for service on the prisoner, and an authority for the prisoner to be charged as a habitual criminal, had been received at the Chief Constable's office. It was proposed to put the authority in evidence. It was objected that this authority was not admissible without the whole letter and contents, and also on the ground that the authority was bad in form, as it was not addressed to anyone and not produced by the right officer. I admitted it." One notice was produced in Court. That was the notice to the proper officer of the Court.

The LORD CHIEF JUSTICE: I want to see the letter which is objected to, please.

The objection I took to the notice was this: the notice that was produced by this officer was a notice which was addressed, or, rather, was enclosed in a letter to the proper officer of the Court. The notice itself was not addressed to anybody.

I have not got a copy of it.

The LORD CHIEF JUSTICE: You had better have a copy of it. It is signed by the Assistant Director. "I beg to give you notice in pursuance of section 10 (4) of the Prevention of Crime Act, 1908, that my consent having been duly given in that behalf, it is intended to insert in the bill or bills of Indictment to be preferred against Edward Turner at the Worcestershire Quarter Sessions, to be holden at Worcester on the 11th day of October, 1909, a charge under the said Act against the said Edward Turner of being a habitual criminal. Dated this 2nd day of October, 1909."

That is not addressed to anybody.

The LORD CHIEF JUSTICE: Except "The Clerk of the Peace, Worcester."

I think that is not so on the original. I do recollect this, that one notice was not addressed to anybody, and that apparently was notice giving consent.

GRANTHAM J.: How do you say it was not addressed to anybody?

It was enclosed in a letter signed by the Assistant Director of Prosecutions, in which he said: "I beg to enclose formal notice under section 10 of the Prevention of Crime Act." That letter was not put in, possibly because it referred to the fact that this notice was out of time. It is at the bottom.

GRANTHAM J.: That letter is addressed to S. Thornely, Esq., Clerk of the Peace for Worcestershire, Worcester. The other notice enclosed simply: The Clerk of the Peace, Worcester.

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Yes.

Grantham J.: There is nothing in that.

One of these notices was not addressed to anybody at all. The objection I took to the notice was that it could not be put in evidence without some evidence to shew by whose authority it had been signed.

Grantham J.: On whose authority? Do you say it was not addressed to anybody?

It is my recollection of what I saw from the notice.

Grantham J.: I can understand if you are speaking of your own recollection why the mistake arose.

I may have made a mistake.

Grantham J.: You will see on what my Lord has handed down after the name comes "(8 Edward VII., Chapter 3, section 1 (5)." Then in another line is, "The Clerk of the Peace, Worcester." It is highly probable you did not catch sight of that.

I took the objection at the time, and nobody pointed out that it was there.

Channell J.: So far as the consent is concerned, and not the notice, why should it be addressed to anybody? It is a notice to all the world that he consented to the prosecution.

This is the consent; it was addressed to somebody, the notice was not addressed to anybody. It was never put in evidence.

Channell J.: If it was sent to him by post it must have been addressed to somebody.

Grantham J.: It is enclosed in a letter addressed to him. He refers to it: "I beg to enclose."

That letter was never put in evidence, they would not put it in. The real point is whether this consent of the Director of Public Prosecutions can be received in evidence without calling somebody to prove it.

CHANNELL J.: That is a point of considerable difficulty.

I must refer your Lordship to the statute which enables judicial cognisance to be taken of signatures of judges. The point is whether the Court ought not to require proof that Mr. Guy Stephenson had written it, by some clerk who knew his handwriting.

CHANNELL J.: That is a difficulty that arises almost always in these cases.

As your Lordships know, it was necessary to pass a special Act of Parliament in order that the signatures of judges of the High Court should be taken judicial notice of. That is 8 & 9 Vict. c. 113, sect. 2 (the Evidence Act, 1845): "All courts, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the judges of" the Supreme Court, "provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." I draw your Lordships' attention to that to shew that these things are not admitted as a matter of course, and that this Act of Parliament had to be passed even for the purpose of admitting the signatures of judges, and, of course, in criminal courts the rules of evidence are particularly strict. The other point I want to call your Lordships' attention to is as to the fiat of the Attorney-General. The only analogous case I can think of is the case of the fiat of the Attorney-General which is necessary under certain circumstances. The editors of Archbold say it is necessary to call somebody familiar with the Attorney-General's signature to prove that document in the ordinary course. That your Lordship will find in *Archbold* (23rd ed.) at page 584: "Also prove the written fiat of the Attorney-General authorising the prosecution by calling his clerk or otherwise."

The LORD CHIEF JUSTICE: That was certainly the practice. I remember on many occasions the gentleman who is in the service of the Attorney-General telling me he had to prove my signature to a fiat. There is no doubt of the practice, but whether it is still law I do not know.

I must refer to *R.* v. *Dexter and others*, 19 Cox, C. C. 360 (1899), because in that case Mr. Justice Grantham said that in arrest of judgment it was not a good point to take that the fiat of the Attorney-General had not been properly proved. That was in arrest of judgment, and I think different considerations might well apply.

The LORD CHIEF JUSTICE: In your case the point was taken.

Yes. If the point were taken at the opening of the trial, of course an adjournment might be granted, and in that way there would be no harm done, but to take it after the verdict of the jury is obviously too late.

I do not know that there is anything else that I need call your Lordships' attention to as regards paragraph 6. Then paragraph 7 of the case says:—

"A notice sent by the Public Prosecutor to the Clerk of the Peace was tendered. It was objected that the officer who should produce it should be called and sworn and produce the notice sent to him. I admitted the notice without calling the Clerk of the Peace."

Again, that is a very small matter of procedure and practice, but, my Lords, I know of no rule which enables the Clerk of the Peace to be a privileged person and not go into the witness box in the ordinary way.

CHANNELL J.: Was no evidence of it given; was it only produced?

It was merely produced.

R. D. Muir, for the Crown: By whom?

Produced by the Clerk of the Peace; that was the officer of the court in open Court.

The LORD CHIEF JUSTICE: That is the document Mr. Coventry has been referring to.

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Yes, one of those two notices; I am not sure which it was of the two.

GRANTHAM J.: The 2nd October?

Muir: No, this is the notice first of all. There is the actual consent itself. Then a notice that the Director has consented must be sent to the Clerk of the Peace, and a third notice has to be sent to the prisoner, and the third notice contains different things.

Coventry: My Lord, there might be a little confusion with regard to these notices.

The LORD CHIEF JUSTICE: We want to know what is the document which was tendered. The notice sent to the Clerk of the Peace was tendered. He says: "I admitted the notice"; what is the document?

It is the one referred to in sub-sect. (b).

CHANNELL J.: The point, I understand, is this: whether the notice to the Clerk of the Peace can be proved by his producing it merely without being sworn as a witness, that is the whole point.

That is the point.

CHANNELL J.: On the assumption that it is a correct notice.

On the assumption that it is a correct notice.

Muir: The document was the one which your Lordship read addressed to the Clerk of the Peace.

GRANTHAM J.: Why should not it be produced by someone else? Why should the Clerk of the Peace come and say: I was at my office and I swear this is it? Supposing he does not open the letter, though it is addressed to him, and his clerk opens the letters with reference to these cases. His clerk may say to him, This is a letter from the Director of Public Prosecutions. Why should the Clerk of the Peace come to say that and not his clerk?

Coventry: I do not mind who produces it, but it must be produced in the regular way.

Channell J.: There may be this reason for it in the very case my brother is putting, because that is one of the points that arose before me at a trial. It related to a case at the Assizes. The notice was served (nobody doubted it, but there was a question of the proof of it) at the Clerk of Assize's office in London, and it was sent down to him, because he was already on the Circuit, by post from his clerk in London, and it reached the actual Clerk of Assize less than the necessary seven days, because it had been served in London in the right number of days, on the last day, and it got to the Clerk of Assize in the country the next day. If that is a material point it is obviously necessary to have some witness to prove the service in order that you may get the point of time.

Orders of Court, anything that the Clerk of the Peace has to produce in the shape of minutes or records, or anything of that sort, have to be produced in a regular way by his taking an oath and saying: I produce this. You cannot dispense with an oath merely because a man is an officer of the Court. That does not dispense with the ordinary rules of evidence, and evidence must be tendered on oath.

Grantham J.: Care must be taken that there is nothing done to prejudice prisoners in these cases, but it does seem our duty to prevent wasteful expenditure.

It is a mere matter of the Clerk of the Peace taking the Testament in his hand. I think he would always be in the court, because it is "the proper officer of the court by which the offender is to be tried." So that he must be there.

CHANNELL J.: If the document when it gets to the Clerk of the Peace, who is an officer of the Court, becomes a document of the Court, then the Court may look at it and deal with it. That is the reason why, as a general rule, a Clerk of the Peace when he produces documents does not have to be sworn, because they are documents that are the records or documents of the Court, and the Court looks at its own documents.

Yes, my Lord; but this is not sent to the Court.

CHANNELL J.: All observations by a judge to counsel who is arguing are not necessarily meant to be against him. That was meant to be in your favour.

Yes. My Lord said the Court can always look at its own records. With submission I do not know that that is universally true; for instance, records of convictions I do not think the Court could necessarily look at, without the assistance of an Act of Parliament which enabled them to be treated as certificates, without proving the signatures to the certificates in the usual way.

CHANNELL J.: There would be a difficulty there in most cases practically about it being the same Court. The Court of Quarter Sessions is not a continuous Court quite. You remember all the difficulty that has arisen about taxing costs.

Yes.

GRANTHAM J.: I might say, Mr. Coventry, with reference to this question of Clerk of the Peace, I myself, as Chairman of Quarter Sessions, know a good deal of what is done practically by Clerks of the Peace—not in reference to this case. They do not receive these notices themselves; they have so much to do for the county; they have a clerk who is in charge of the various documents which come in reference to cases of this kind; that clerk opens the letters, and afterwards, it may be or may not be, he shews the letter to the Clerk of the Peace.

The LORD CHIEF JUSTICE: That would be in favour of the

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proper person being called to shew that it was received on a certain date.

Then paragraph 8:

"The superintendent was sworn, and stated that he served on the 4th October, 1909, the notice on the prisoner which had been sent down by the Director of Public Prosecutions. There was, however, no copy of this notice, and there was no evidence to shew what were the contents of the notice; and as no notice to produce it had been given to the prisoner, I refused to allow secondary evidence to be given of the contents of the notice so served."

That is rather an important point, whether it is necessary to give notice to produce the notice that has been sent down by the Director of Public Prosecutions to the prisoner, and in the absence of any notice to produce whether you can give evidence of the contents of such notice. The Act distinctly says that not less than seven days the offender has to have notice that it is intended to insert this charge and shewing the grounds upon which the prosecution intend to rely, and you must prove, by proof in a regular way, that the prisoner has had such a notice, and the only way it can be done is to give the prisoner a notice to produce the document.

Channell J.: I thought it was a general rule you never had to give notice to produce a notice, on the principle that if you had to do so you would have to give notice to produce that notice and the other, and so on; it might go on *ad infinitum.*

Is not your Lordship stating it too widely when you say it is not necessary to produce a notice? I know there are authorities with reference to notice to quit, and notice of dishonour of a bill of exchange, but I do not know that any authority goes as far as to say no notice need be given to produce any notice. That is a little further, I think, than any authority has gone, or the very general rule that notice to produce has to be given in all cases in which you want to rely on documents in the possession of somebody else.

The Lord Chief Justice: Who took the objection that no notice to produce had been given?

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I did.

The Lord Chief Justice: For the prisoner. It is rather like the case we had under the Motor Act. (*R.* v. *Thompson*, (1909) 2 K. B. 614.) This is a document *primâ facie* in the possession of the prisoner.

It might never have been served upon him.

Grantham J.: And no suggestion that he had never received it.

No, they never called for it.

Channell J.: What was the proof of the service of it?

Coventry: The secretary of the Chief Constable said he served it. It was not contradicted. I had no communication at all with the prisoner. I was merely asked to take this point. Of course if it had been called for and the prisoner had got it in his pocket and chose to produce it, no question that would be sufficient. The prosecution were in great difficulties because they kept no copy; they were not in a position to give secondary evidence. They could not really get on at all; only the learned Chairman thought one or two points ought to be settled, and that he would like the thing to go through.

This notice is a very important document under the Act, because the Act gives the prisoner no other notice, because the indictment merely charges him with being a habitual criminal.

The Lord Chief Justice: My observations were not directed to the necessity of giving notice, but the refusal to allow secondary evidence, and I did not quite see how the prosecution could get on at all without secondary evidence.

If it is material to the question whether a man is properly convicted or not—if it is a condition precedent to the trial, and the trial cannot continue without that secondary evidence, the case ought not to have gone on.

CHANNELL J.: The difficulty you would be in would be, would it not? that when you began to produce evidence of a particular conviction you would not have evidence that he had notice of that one.

That is the objection.

GRANTHAM J.: The singular part is in the eighth paragraph; the evidence apparently is this: that the Superintendent swore that the notice served on the prisoner was the notice which had been sent down by the Director of Public Prosecutions. Here we have the notice.

It was in a different form altogether. It states the grounds. Then on that ground in this case I submit that clearly the verdict of the jury cannot stand. Then as regards paragraph 9 the same. "The superintendent stated that the notice was served on the 4th October, and the Sessions were held on the 11th October. The section says that a charge of being a habitual criminal shall not be inserted unless not less than seven days' notice has been given. It was objected that seven days' notice had not been given in this case, and that it ought to be seven clear days. I overruled the objection."

The LORD CHIEF JUSTICE: What day was he being tried?

On a Monday, the 11th October.

The LORD CHIEF JUSTICE: Do you contend seven days must be before the first day of the Sessions?

Yes; there must be seven clear days between the date of giving the notice and the first day of the Sessions. It must go to the day of the opening of the Sessions; but the point does not arise here.

GRANTHAM J.: The only point in the case is the seven clear days; no question whether it is to be taken to the beginning of the Sessions; that does not seem to have been raised.

It was raised.

Grantham J.: I have the Case before me: "It was objected that seven days' notice had not been given in this case, and that it ought to be seven clear days."

Yes. It must be clear days. The case of *In re Railway Sleepers Supply Company* in 29 Chancery Division, 204; 54 L. J. Ch. 720; 52 L. T. 731; 33 W. R. 595 (1885), makes that clear. I do not think it will be argued.

Muir: I hope my friend will not say that.

Coventry: Then paragraph 10:
"An inspector of the Detective Department of the Birmingham Police produced a conviction dated the 22nd October, 1900, of the prisoner of warehouse breaking. It was objected that this conviction was inadmissible in evidence as there was nothing to shew that it was one of the convictions which were specified in the notice on which the prosecution relied at hearing of the charge."

The Lord Chief Justice: That is the same thing, of course.

"I was of opinion that this objection was good, but in order that the practice might be settled I admitted the evidence and stated that I would give the prisoner every facility to appeal. The same objection was taken as to the other two convictions which were proved against the prisoner."
Then paragraph 11:
"No evidence was offered that any notice had been given to the prisoner of the nature of the evidence the prosecution proposed to call to shew the prisoner was leading a persistently dishonest life. The superintendent of police was called to prove that the prisoner was leading persistently a dishonest or criminal life, and the superintendent stated that the prisoner had done no work except an occasional odd job. It was objected with regard to this that this evidence was not admissible on the ground that nothing could be given in evidence with regard to the prisoner's conduct but what had taken place since the last conviction, the words of the Act being 'that he is leading persistently a dishonest or criminal life,' and that they must refer to the life after the last conviction, and not to the life which he led before such conviction. I was of opinion that this view was correct, but considered that the question

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whether the evidence ought to be admitted should be the subject of appeal to the High Court as to its admissibility."

The facts are not quite accurately stated there; what the superintendent sought to prove was a conviction dating back so far as 1899. That appears in the shorthand notes, and the convictions upon which this charge of being a habitual criminal was based were in 1902, 1903 and 1905, and I objected that you could not go back beyond 1905 to shew what sort of life the prisoner was leading then—1905, the last of the three.

Grantham J.: The last conviction, that is your case; you cannot go back beyond the last conviction, you say. I should like you to justify that.

Yes; I want to contrast that present tense with the past tense higher up in the section. It says that: "he has at least three times . . . been convicted . . . and that he is leading persistently a dishonest or criminal life." I think what constitutes a habitual criminal is the fact that he has been three times convicted, and after the last of those convictions he continues to lead a dishonest life—you cannot go back ten years before. Supposing a man has come out of prison ten years ago——

Channell J.: You are not to assume that imprisonment never does a person any good.

No.

Channell J.: I agree you cannot always go back. I do not say the earlier evidence might not be admissible for some purposes, but is not your real point there was no evidence after the last conviction?

There was evidence after the last conviction in this case.

Grantham J.: You contend although there was evidence of bad conduct after the last conviction, because they gave evidence of his life before the last conviction it vitiated the evidence which was given of his life after the conviction?

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Yes, they started giving evidence from February, 1899. Then my objection arose, and it is put in the Case. You cannot go back after three convictions to a previous case and see what sort of life a man was leading at that time. He may be an entirely reformed character—he might be—but the Act says, whether he *is* leading a dishonest life.

CHANNELL J.: There must be some evidence of present bad life, but why should it be inadmissible to say he is now doing precisely the same thing he was doing ten years ago?

I think the Act deals with that, because the three convictions go to that. That satisfies the jury.

CHANNELL J.: That is enough as to anything before that?

The jury have to decide what he has been doing since. That is the interpretation which I submit ought to be put on the clear words of the Act. It would have been very easy to frame the Act to admit evidence of antecedent dates if it had been intended. The Act talks about that; there must be proof that he has been convicted three times, and that he *is* leading persistently a dishonest or criminal life.

GRANTHAM J.: It seems to me that if that is the law which is alleged to be the law here it was for the benefit of the prisoner, because the constable, or whoever gives the evidence, might simply rely on the life the last year or two or the last few months, supposing he had been convicted within a year, and gone to penal servitude, whatever the time was—it seems to me it makes the case stronger against him if the constable connects the life before his conviction with the life after.

Supposing a hiatus of ten years in which the man was doing good work, I submit it would not be admissible. The words of the Act of Parliament deal with the present tense, the present time.

CHANNELL J.: You must go back to some extent. It would not mean the day before the indictment, would it?

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No, you must go back to the last of the three convictions—I could not put it higher than that—and prove that since then he is leading a dishonest life.

Now the next point is that there was no proof.

"12. It was submitted by the defence that there was no case to go to the jury, as the Crown had not proved that the prisoner was more than sixteen when the first conviction took place; that the notice was bad in not specifying the convictions and other grounds to found the charge," and then are set out the various objections I took why the case should not go to the jury. As regards that, there was no proof that the prisoner was more than sixteen——

The LORD CHIEF JUSTICE: Was there any proof of his age?

No, not at any time.

GRANTHAM J.: I was going to ask about the Calendar. Was the Calendar there?

Yes, my Lord.

GRANTHAM J.: Did not it state what was his age?

Twenty-nine years of age, and the first conviction proved was about ten years ago; so that he was about eighteen or nineteen when convicted.

CHANNELL J.: So that it was a matter of some doubt.

Yes, my Lord.

GRANTHAM J.: The age in the Calendar is stated on the authority of the prisoner, as a rule.

Yes, my Lord. In this case there was no proof.

GRANTHAM J.: There it is in the Calendar that he is twenty-nine. If you take off ten years it leaves nineteen.

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The Lord Chief Justice: What is the authority for those ages in the Calendar?

Grantham J.: As I stated, the Governor or prison authority asks the prisoner.

The usual practice is, when the man is arrested, he is asked his name, address, and age. That will do. If a police-constable was called, and said he was asked, and admitted he was twenty-nine, that would be evidence. As regards this, I do not know where they got the evidence of age from, because the police-constable was asked whether, when he was arrested, he mentioned his age, and he said no.

The case merely states there was no evidence:—

"It was submitted by the defence that there was no case to go to the jury, as the Crown had not proved that the prisoner was more than sixteen when the first conviction took place; that the notice was bad in not specifying the convictions and other grounds to found the charge; that there was no evidence to shew that the prisoner had any opportunity of meeting the case, or of bringing rebutting evidence; that there was nothing in the notice specifying the other grounds upon which it was intended to found the charge; that the notice was out of time, and had not been properly proved. There was no evidence of the age of the prisoner either at the time of his conviction or at the time of his arrest on this charge."

Grantham J.: Was the point taken while the case was before the Court?

At the conclusion of the case for the Crown, I submitted that there was no evidence of the prisoner's age.

The Lord Chief Justice: It was taken before verdict.

The Chairman goes on to say:—

"I overruled these objections and left the case for the jury. The jury found the prisoner guilty, and the Court sentenced him to five years' detention as a habitual criminal."

Channell J.: Did he leave any question on his age to them?

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I did not deal with the merits, I dealt with the points of law.

CHANNELL J.: No, I say did the Chairman leave to the jury any question of age, because sometimes that may be the only way to do it?

There was no evidence.

CHANNELL J.: Then look at him.

The curious thing was that he looked a man of about sixty; we could not believe it when we looked at the Calendar and saw that he was put down as twenty-nine years of age.

CHANNELL J.: Perhaps, being a habitual criminal, he may have known of this point. What are we to do when they do learn it? When they are asked their age and say they are sixteen, then that will prevent the proof of any previous convictions against them if that is to be final.

It is only a question of what weight the jury would attach to evidence—as long as there is some evidence.

CHANNELL J.: I do not say it is right or wrong. This point was taken before me and I put it to the jury. "You see the date of this, it is for you to say whether you are satisfied that he was sixteen at the time." The man there looked a considerable age, and there was no doubt about it at all.

I do not deny it could be proved by the policeman coming and saying, "I asked him his age and he said twenty-nine." I do not contradict that, but there was no such evidence. My point is that you must call the man to whom some statement has been made, and you may not rely on what is in the Calendar.

CHANNELL J.: May you not rely also on the prisoner's appearance?

It would be dangerous in this case, because the man certainly looked sixty and he was only twenty-nine—his age was stated at twenty-nine in the Calendar.

There is a further point on which the Court asked for your Lordships' direction, that is paragraph 14.

"A further point arose as to whether he ought not to have been sentenced to penal servitude before the indictment for being a habitual criminal was tried. I held that this was not necessary, and that both sentences might be pronounced together."

GRANTHAM J.: I should have thought it was rather in his favour that he was not sentenced before the second trial.

CHANNELL J.: Besides which, the previous convictions may be a very material matter for you to know.

It is entirely a question for your Lordships.

R. D. Muir (with him *Oscar Walker*), for the Crown: "The questions of law for the consideration of the Court are:—

(1) Was the direction, that the jury should be sworn as in cases of felony, when the charge to which the prisoner had pleaded guilty in the indictment was felony, correct? or how should the jury be sworn?

(2) Was it necessary that the whole of the letter and all the contents received by the Chief Constable from the Director of Public Prosecutions should be put in evidence, or could one of the enclosures be put in evidence without the rest?

(3) Was it necessary that the Clerk of the Peace should be called and sworn to produce the original notice sent to him by the Public Prosecutor?"

The LORD CHIEF JUSTICE: That means the notice of an intention to put it in the indictment.

Yes. Then:

"(4) Was I right in refusing to allow secondary evidence to be given of the contents of the notice served upon the prisoner?

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(5) Was the service of the notice on the 4th October, the Sessions being held on the 11th October, a sufficient notice within sect. 10 of the Act?

(6) Was the conviction dated the 22nd October, 1900, or the other convictions proved admissible in evidence ——"

The Lord Chief Justice: Do those mean earlier convictions?

Earlier and later, my Lord—" there being no evidence to shew that they were the convictions mentioned in the notice?

(7) Was it necessary to prove that notice was given to the prisoner of the evidence to be called to prove he was leading a persistently dishonest or criminal life?

(8) Was I right in admitting evidence of the prisoner's dishonest or criminal life previous to the last conviction, or should the evidence be confined to proving that the prisoner was leading persistently a dishonest or criminal life since his release from prison after his last conviction?

(9) Was it necessary that evidence should be given to prove that the prisoner was over sixteen when the first conviction took place?

(10) Should the sentence on the first count of the indictment have been given before the prisoner was placed on his trial as a habitual criminal?"

Channell J.: Now he has not stated the question whether or not it is necessary to prove the Public Prosecutor's signature.

No, he has not stated that question, unless it is involved in this question, which is the second of the two: "Was it necessary that the whole of the letter and all contents received by the Chief Constable from the Director of Public Prosecutions should be put in evidence, or could one of the enclosures be put in evidence without the rest?" I think that is the question that is intended to include that.

Now if your Lordships please, I will deal with the questions in the order in which they are put; as to how the jury should be sworn. This is a special case. I want to contend that it is sufficient to swear them as for misdemeanour.

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CHANNELL J.: In all cases?

In all cases. It does not really arise, but if your Lordships will look at this indictment you will see it is in the usual form; it is not, as stated in the special case, a count in the indictment at all; it is a mere allegation added to an indictment, and no trial upon that allegation involves any question as to whether the prisoner is or is not about to be convicted of a felony. Unless the issue before the jury may be decided by them in such a way as either to convict or acquit the prisoner of a felony it is clearly unnecessary to swear the jury as for a felony. This is a mere issue of fact which the jury have to determine, and they do not decide that it is either felony or not felony, and that being so, it is sufficient to swear the jury as for a misdemeanour. But swearing them as for a felony clearly must do.

CHANNELL J.: I suppose there is no objection if the offence really is a misdemeanour, and you swear the jury as for a felony; there would be no objection taken to that; you are unnecessarily giving the prisoner challenges——

And unnecessarily occupying time.

The LORD CHIEF JUSTICE: In cases where a jury have convicted for misdemeanour they have very often been sworn as for a felony.

I have inquired at the Old Bailey what the practice was before this Act, and I was told there was no analogous case.

GRANTHAM J.: It constantly happens in the criminal courts.

A prisoner pleading guilty to an offence and pleading not guilty to a previous conviction has very seldom happened. But it will constantly happen now that he will plead guilty to the offence charged in the indictment and not guilty to being a habitual criminal. I may tell your Lordships at the Sessions in London the practice is to swear on this count as for a misdemeanour, whatever the charge may be in the indictment, whether felony or misdemeanour, and whether the present or a previous charge be felony or misdemeanour, and of course they very often are mixed. If your Lordships can express an opinion we shall be grateful for it, but it clearly does not arise in this case.

The next is, as I understand it, the real question, how must the consent of the Director of Public Prosecutions be proved? Your Lordships are familiar with the cases about proving the handwriting by a merchant in London of a correspondent abroad whom he has never seen write.

GRANTHAM J.: I do not understand what the question is; I cannot make it out.

The LORD CHIEF JUSTICE: What I understand is this; it is put in a very awkward form. Supposing the notice enclosed is self-contained, and would speak for itself if properly proved, it scarcely can be necessary to put in the whole of a letter in which it was which may contain other business altogether.

Yes, my Lord, and I submit the proper way to prove it is for the person who wrote to the Director of Public Prosecutions for his consent to say: "I wrote a letter to the Director of Public Prosecutions, this is the reply which I got from him to that letter."

CHANNELL J.: Is it necessary to say, "in reply to my letter"? Supposing you have a local agent acting for the Public Prosecutor—this is what happened in a case I had to deal with—he comes and says: "I was acting, and in due course received this authority."

From the Director of Public Prosecutions.

CHANNELL J.: Yes. He was asked: "Do you know the handwriting of Mr. Guy Stephenson?" as here. He said: "I have had a great deal of correspondence with him, but I cannot say I know his writing."

There might be the common case of the Director of Public Prosecutions sending it down to somebody without having had any previous request. That might be so, but I was putting the

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strongest case against myself of a gentleman who was communicating with the Director of Public Prosecutions for the first time in his life. Then it is enough, according to Taylor on Evidence, p. 1337, 10th ed., s. 1864, and the authorities he cites there, if a letter comes in reply to a letter sent by you purporting to be signed by the person to whom you addressed your letter, that is *primâ facie* evidence not only that it comes from that person, but that it is in his handwriting.

CHANNELL J.: If you have got to do that, you have to prove things which are difficult to prove as a rule. You have to prove a copy of your letter, possibly a notice to produce it, and possibly the posting of it—all as to your letter to the Public Prosecutor. It would be a great burden on you, and it is not habitually done.

The more simple we can get it the better.

The LORD CHIEF JUSTICE: I know, but you put that case to us. You are going to justify the admission without proof, on the ground that it is in reply to some letter which is sent to the Public Prosecutor. My brother points out, if that is so, you have a lot of independent things to prove, and it will not be simple at all.

This officer who was called here produced it; he said "I got it." If your Lordships say that the mere production of a document purporting to be signed by the Director of Public Prosecutions, and a statement by the person who produces it, "I received it from the Director of Public Prosecutions——"

The LORD CHIEF JUSTICE: Assume a vindictive clerk in the Treasury Department has really sent down this notice, and it has never been before Mr. Guy Stephenson at all, is the Court bound to take a letter which is simply signed "Guy Stephenson, Assistant Director of Public Prosecutions"?

No, my Lord, I do not think they are. I was putting to your Lordship that there would have to be either a knowledge of handwriting acquired by correspondence, or the fact proved that the document came in answer to a communication addressed to the Director of Public Prosecutions.

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The Lord Chief Justice: One or the other, but in this case neither was proved.

It would have been proved if the Chairman had allowed it to be proved, but what he said was, or rather the objection taken was: You cannot put in this document which you say came from the Director of Public Prosecutions in answer to your request, unless you also put in a bundle of other documents which came in the same envelope.

The Lord Chief Justice: I thought you were arguing the real point. I should have no doubt if a gentleman said, "I have been in constant correspondence with the Assistant Director of Public Prosecutions, and I know his handwriting, and that is it;" but there was nothing of that sort proved in this case. Mr. Coventry was arguing it should be put in as some public document. Where does it arise in the shorthand notes?

The thing seems to have been stopped at the very inception. Question 4 to the Superintendent of Police and Chief Clerk of the Worcestershire Constabulary: "Q. Have you seen, and do you produce, the authority of the Director of Public Prosecutions?" That means the consent. Mr. Coventry: I object to this. 5. Mr. Milward (to the witness): Look at it. A. Yes. Mr. Coventry: I must object to this way of proving an authority of this kind. Of course there are recognised methods of proving. I cannot accept that. I merely object. The Chairman: How do you prove it? Is it in the Documentary Evidence Act? 6. Mr. Milward: I think it is possible for me to prove it by simply asking a verbal question. (To the witness): Does the Director of Public Prosecutions consent to this course? A. He does. The Chairman: No, no. Mr. Milward: Strictly speaking, that could prove it. I propose to go on, if I may. The Chairman: I may tell you my view. I think it is very important we should have these questions determined, and whatever my view of the matter may be I think I shall let in different documents, so that we may be put right, or have the practice laid down for us, without expressing any opinion upon them, so that if, as I should expect, Mr. Coventry goes to the Court of Criminal Appeal we shall know what is the line to guide us for the future. But otherwise, I certainly should feel very grave doubts about it. Mr. Milward: As it stands. The Chairman: As it stands; and not producing the notice, because you see the notice has to contain certain facts which the Court ought to have before it. Mr. Milward: I agree. The Chairman: Because they have not got a copy of the notice, unless Mr. Coventry produces it."

He is now speaking of another notice—another thing altogether, the prisoner's notice.

CHANNELL J.: The consent is the easiest thing to prove that there is; if you do prove really and properly a notice by the Public Prosecutor to the prisoner that he intends at the end of seven days to prefer a certain charge against that prisoner, it is obvious that the Public Prosecutor must consent to it being done, because he says he is going to do it himself, so that the consent there is no difficulty about really, but the signature has to be proved to some of the other documents.

There are two things argued here. The Chairman says: "I shall admit it, although if it was not this case, I should not like to. Mr. Coventry: I may at once state my objection to that notice."

The LORD CHIEF JUSTICE: It may be as my brother points out, the difficulty about this first consent would be cured by proof of the notice to the prisoner that he is going to have a charge made against him.

Yes, my Lord. You must prove handwriting in one or other of the ways I have put.

The LORD CHIEF JUSTICE: Now 3. Was it necessary that the Clerk of the Peace should be called and sworn to produce the original notice? That means of this same document.

No, that is a notice. First of all there is the consent, which is one formal document. The next is a notice to the Clerk of the Peace that it is intended to insert in the indictment the allegation that he is a habitual criminal.

CHANNELL J.: The question should really be, Is it necessary

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that a witness should be called—it need not be the Clerk of the Peace—the secretary or anybody who happened to be in the office, or, I should have thought, the person who took it to the office, equally; somehow or other ought not there to be proof of its service?

Your Lordship must see how the statute deals with that, because I think the real point is the question of time. If it was merely the question that the Clerk of the Peace had received a notice, the physical handing up of the notice to the presiding judge in the presence of the jury would surely be enough to shew that he had received a notice.

Channell J.: And there would be the fact that he had put it into the indictment, because the object of the notice to the Clerk of the Peace is that he should put it into the indictment.

Yes, so that that would shew he had received a notice, it would not shew when he received it. That, I think, is the difficulty here: "Provided that a charge of being a habitual criminal shall not be inserted in an indictment"—that deals with the date before which the notice must be given; the finding of the bill by the Grand Jury, which would be presumably on the first day of the Sessions; if it was found at a later date of the Sessions that would again fix the date, but presumably that would be the first day of the Sessions—" . . . unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender that it is intended to insert such a charge." I think the only way that I can put it in this case is that the date upon the document is *primâ facie* evidence of the time at which it was served.

I do not say it is the date of the service, but it is evidence of the date of the service; it would be posted in due course and be received not later than the 3rd or 4th October, and the 4th October, according to my contention, is in time—in sufficient time, that it may have been received in seven days, so that it is evidence of the date on which service would be complete. That is the only way in which I can put the point on this. No. 4 is notice to the prisoner.

Is notice to produce necessary in order to let in secondary evi-

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dence? That is the point in this case; this turns entirely on the notice to produce, because your Lordship sees the Chairman excluded secondary evidence. I cite from Taylor on Evidence. It is the first volume, page 346, 10th edition. It begins at page 345: "In seven cases notice to produce is not necessary, namely," and then the second of them is, "Where the document required is itself a notice."

On the question of notice to produce——

The LORD CHIEF JUSTICE: We do not trouble you on that. Notice to produce is not necessary; that means that secondary evidence ought to have been admitted. That is the answer to that question.

The next question is whether or not less than seven days means seven clear days.

The LORD CHIEF JUSTICE: Seven clear days from when, do you say, or seven days from when?

Up to the date on which the Grand Jury find the bill.

The LORD CHIEF JUSTICE: It is not when he is tried, but when the bill is found.

Yes, that must be so, because it is a notice of intention to insert the charge in the bill.

The LORD CHIEF JUSTICE: I meant the notice to the prisoner; you think it ought to be some number of days before the bill is presented.

Yes, the same notice must be given to the prisoner which is given to the Clerk of the Peace and in addition something more, but the date is the same in both cases.

The LORD CHIEF JUSTICE: From when do you say that is to run?

From the date on which it is served. That does not mean seven clear days. I refer to a case of *The King* v. *The Justices of the West Riding*, in 1 Nevile & Manning, 426 (1833). There it was a notice of appeal under 55 Geo. III. c. 68, against an order for diversion of a highway. Ten days' notice of appeal under the Act had to be given, and it was held there that the ten days must be computed "one day inclusive and one day exclusive."

The Lord Chief Justice: Will you read the words of the Act?

The Act is not set out, but the Case states: "At the Sessions it was objected on behalf of the respondent in the first place, that the notice of appeal was defective in not stating that the appellant was injured or aggrieved; and, secondly, that ten days' notice of appeal had not been given." And there was a rule of Sessions that: "In all cases of appeal, not otherwise directed by law, ten days' notice in writing shall be given by the party appealing, his, her, or their attorney or solicitor, exclusive of the day of service, and the first day of the Sessions"—but the statute only required that ten days' notice of appeal should be given; and "not less than seven days' notice of appeal" means seven days' notice of appeal. Seven days is not less than seven days, so that the language is exactly the same. The judges held that it was provided by law, and not affected by the rule of Sessions, and that ten days meant one day off at the end, and you counted the first day, or the other day—one day excluded and one included. This question only arises on this other notice, and if by secondary evidence or otherwise, it is shewn that the notice to the prisoner and to the proper officer was seven days excluding one day, it will do.

Grantham J.: But there was positive evidence that the notice was served on the 4th.

That is notice on the prisoner.

Grantham J.: Yes, served on the prisoner on the 4th.

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There is another case in 4 Nevile & Manning of *The King* v. *Cumberland Justices* (1835) at p. 378, 1 H. & W. 16, which is to the same effect. The marginal note there is: "Where a certain number of days' notice of an intention to do an act is required the day of the service of the notice is excluded from the computation, and that on which the act is to be done is included —unless there be some special provision requiring a different mode of computation." That is all I have to say on that question about the time.

The LORD CHIEF JUSTICE: In this particular case no evidence was given of the contents of the notice to the prisoner.

No, my Lord.

The LORD CHIEF JUSTICE: Therefore the conviction can scarcely stand, can it? It seems to me if there is no evidence that he ever had notice of the three convictions they were going to allege against him, or of his persistently leading a dishonest or criminal life, one does not quite see how he can come prepared to meet the case.

There was evidence that a notice was served upon him under the Act for the purpose of complying with the Act. The object of that notice is that he may have brought to his mind the charges which will be put in the indictment.

The LORD CHIEF JUSTICE: If secondary evidence had been given the whole thing would have been cured, but the learned Chairman excluded the secondary evidence.

Yes, my Lord, but what I was going to submit to the Court was this. Is not the object of that notice to enable the prisoner to say this, if evidence is given against him with regard to something which is not in the notice, is it not for him to say, it is not the notice I have got? He listens to the evidence given of the convictions proved against him, and if those convictions are not in his notice, is it not for him to object and say, I have had no notice of this? The Act says I shall have notice of the convictions which are going to be proved against me. What is now being proved is not in my notice. Is not the whole object of the statute satisfied when you prove he has had a notice which purports to be under the Act, and then evidence is given which purports to be in pursuance of the notice, is it not for the prisoner to raise the question ?

CHANNELL J.: If that is the case you might raise that to all the conditions in this section. It is expressly enacted in the section that notice to the offender shall specify the previous convictions, and I think you have not argued that the other things in the section are not conditions precedent to the propriety of the proceedings. It might be said all along they are only directory, and if it was not done it did not signify, but I do not think you can say that, can you ?

No, I will not argue that, and I am not touching on that point now, because it is dealt with in a further question in the Case as to what notice is required of things outside the three convictions--that is dealt with in a further question in this Case, and I propose to argue it if your Lordships will allow me at that stage of my argument.

The LORD CHIEF JUSTICE : We were putting to you the point : Can they get on at all without some evidence as to the contents of the notice ?

I submit yes. I submit that a notice purporting to be a notice under the Act has been served. That has been proved. That must be a notice of three convictions since he was 16.

CHANNELL J. : It ought to be, I do not know that it must be

Evidence is given that the notice has been served upon him, and evidence is then produced that he has been convicted on certain dates. Is not the statute complied with? The prisoner has had a notice, evidence must be in pursuance of that notice. Is it not for the prisoner to shew then that the evidence which is being given was evidence of which he had no notice ? Is it not to be presumed that the notice will be served in the ordinary and right course? That is of course merely upon the point that the Chairman in this particular case has refused to allow secondary evidence to be got in at all.

The LORD CHIEF JUSTICE: We quite understand that. We have none of us any doubt you can cure it by giving secondary evidence. But the point you are arguing is, you can convict a man or try a man although no secondary evidence is given.

Yes, that is the position in this case, and the argument I have submitted is the only one which occurs to me in support of the conviction in the circumstances.

Then the next, question 7:—Was it necessary to prove notice of the evidence of a dishonest life?

The LORD CHIEF JUSTICE: The word is "grounds."

Yes, and your Lordship sees that while you must specify the convictions, which involves dates and places and so on, all you have to specify outside those convictions is "the other grounds."

The LORD CHIEF JUSTICE: But you have got to give him an indication of that which you are going to say against him, to shew that he is leading persistently a dishonest life.

I submit all we have to tell him is that he is persistently leading a dishonest or criminal life.

The LORD CHIEF JUSTICE: That would be an evasion. You could say: Because you are constantly consorting with thieves. That would do, but you cannot say that he is leading a dishonest life, simply; that is no ground at all.

There are two grounds on one or both of which you must proceed; one is that he is persistently leading a dishonest life, the other is that he is persistently leading a criminal life, because crime may be other than dishonesty, it may be violence. As your Lordship knows, where one is appealing to Quarter Sessions you

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have to state the grounds of your appeal. Is it not a ground that he is persistently leading a dishonest life, or that he is persistently leading a criminal life, other than dishonest,—is not that a ground which is sufficient here ?

Grantham J. : Was that stated here ?

It was in fact so ; the form of notice which was served—of course we have no secondary evidence of it, in fact the form of notice is this : " Take notice that in pursuance of section 10, sub-section 4 of the Prevention of Crime Act, 1908, it is intended to insert in the Bill or Bills of Indictment to be preferred against you (at the Assizes to be holden on such and such a day) a charge under the said Act of being a habitual criminal on the ground that since attaining the age of sixteen years you have at least three times previously to your conviction of the crime charged in the said Bill or Bills of Indictment been convicted of a crime within the meaning of the said Act, and that you are leading persistently a dishonest and criminal life."

Grantham J.: Merely telling him what the Act says.

May I put this case, which is a possible one ?—under the Act a man may be convicted three times in a year, and never have been out of prison more than seven days during the whole of that period, and the final charge on which he was convicted, the one in the indictment, committed on the very day he left prison.

Channell J. : Then you would say, the other ground on which I still say you are a habitual criminal is that the day after you came out of prison you committed this offence.

That is no more than saying he is habitually leading a criminal life. I submit that the Chairman here asks too much.

The Lord Chief Justice : We do not suggest evidence, we were only dealing with your argument that you need give no grounds at all.

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That was not intended to be my argument. My argument was that if you stated he was persistently leading a dishonest life, that was a ground. I understand your Lordship's view on that point, and I do not think I need say anything further.

Channell J.: The notice you read just now I suppose is a form of notice for habitual use by the Public Prosecutor.

Yes, my Lord, they put in both "persistent and criminal."

Channell J.: Then they do not tell him even the two alternatives, which of the two?

Grantham J.: What you contend is that all you have to do is to tell him that you are going to take proceedings against him under the statute which says so and so.

No, I should have told your Lordship I am afraid I have inadvertently understated my case, because the form of notice contains a space for the particulars of convictions outside the three.

Channell J.: I assumed that.

That of course would not apply to the man's conduct since his last conviction. That would give him no notice of any ground applying to his conduct since the last conviction. And of course there might be no space of time at all between the previous release from prison and this conviction.

The Lord Chief Justice: We quite follow.

The 8th question is whether the evidence as to persistency must be limited to the period since his release from the last conviction. It was put that it must be since his last conviction.

The Lord Chief Justice: But can that be answered in the abstract at all; must it not depend on the nature of the case? Sometimes it might be very unfair to say because a man had been convicted before, that shewed he was leading a persistently dis-

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honest life. Take a coining case. If he has reverted, as we know they do, to coining again, it would not be immaterial to shew he had gone back to his old practices.

Yes. My submission with regard to that is this, that if it is shewn that there is a substantial break in a man's dishonest method of life, either the judge should rule that the break is such that there is no evidence to go to the jury of persistency at all, or, if the break is only a small one, that it would be a question for the jury to say upon the evidence before them whether that break is sufficient to constitute a lack of persistency or not.

Channell J.: You mean a break otherwise than his being in prison?

Yes, my Lord.

Channell J.: Necessarily he must have been three times in prison.

I mean a break during which he has been honestly employed and not consorting with bad characters. Is not that the true position here? I submit, my Lords, you cannot be excluded from going far back, because the further you go back the greater the persistency if there is no break; it must be evidence of persistency to shew that over ten years without an interval——

The Lord Chief Justice: I perfectly agree with you in many cases it may be admissible, it may be evidence, I do not think you can say of necessity; in some cases it might be no evidence, I do not think you can answer it in the abstract.

The only thing in my submission that must be proved is that it must be brought up to date, otherwise every case must be judged on its own merits. It is not absolutely shut out because it is before the last conviction.

Grantham J.: I have not seen this form, which has been adopted with due care, before.

It is quite a new form and subject to revision, and we hope to get guidance to-day with regard to its revision.

The Lord Chief Justice : Now about the age.

With regard to the age the only point I can put to the Court is this, that it is in the Calendar. I can add, I think, this there are warders here present who will be able to tell your Lordships if I am misstating what I believe to be the practice—a man, when he is charged by the police, is asked his age among other things : also when he is received into prison he is asked his age, and I think—my impression is—that it is from the prison record——

Channell J.: The Governor makes up the Calendar, of course.

——and not from the charge sheet, the age is taken, but if there were a discrepancy between the charge sheet and the date in the Calendar, that would very likely be brought to the notice of the authorities.

Channell J. : The difficulty is not whether the materials upon which the calendar is made would not be sufficient if they were proved, that is to say if the Governor were to come and say : He told me that, that would be ample, of course, but the question is whether you may put it to the jury without anything else, he is stated in the Calendar to be such and such an age.

The only way in which I can put it is that judges are in the habit of taking judicial notice of the information which is given to them by the Governors of gaols in the Calendar, and I must admit here that unless the Court were entitled to do that there was no evidence at all of an essential fact which had to be proved.

Channell J. : But may not the jury of their own view come to the conclusion that he must have been over sixteen at a certain time ?

In certain cases I think they would come to a conclusion. But in this particular case if the man's age was truly stated as being twenty-nine I do not think that a view would help the jury at all. The earliest conviction of which notice was given him was in 1899, when he would be nineteen. If you were to take him to be twenty-four you would be getting near the limit. The difference between twenty-four and twenty-nine you could not always decide on the view.

CHANNELL J.: I am not suggesting you can. This case is stated to us and we have to decide it upon the facts of this case, but we are rather now considering the general construction of the Act. The difficulty has arisen in a case before me. In that particular case the jury had no difficulty, and could not possibly have had any difficulty in saying eight or nine years ago that man certainly was over sixteen, because he was so mature in appearance that you could tell.

Clearly, in such a case as that, there would be no difficulty. The original notice we have not got, and no copy of it was kept.

CHANNELL J.: We can find it because the shorthand notes will tell us the first conviction.

I can give it to your Lordship. There are two schedules of convictions in that form, one containing three and the other a space for others. Those marked with red pencil were those to put in the "three." the others not so marked were put in the second schedule.

The LORD CHIEF JUSTICE: And a general statement that he was leading persistently a dishonest or criminal life.

Yes, my Lord.

GRANTHAM J.: The difficulty is, it was an *embarras de richesse*; there are so many previous convictions.

Yes. Under the Criminal Law Amendment Act, 1885, the question of proving the age of a girl of sixteen or a girl of thirteen frequently arises, and in that Act there is a provision that the jury may, if they have no evidence before them, on view form their own opinion about the age. That is my recollection of the provision of the Act of 1885 (*a*).

GRANTHAM J.: That comes under a different principle. There, you remember, power is given to the prisoner to give evidence that he was justified in thinking the girl was over sixteen.

Yes.

CHANNELL J.: There, of course, one always refers to the opinion of the jury upon it.

It is in the Act, I think, my Lord.—of course that is an argument against myself, because there it required a statutory provision to enable the jury to act upon their view.

GRANTHAM J.: Taking the practical effect of this, would not it be this? This is a case tried at Sessions. There is a Calendar by which the judge or presiding officer, the Chairman of Quarter Sessions, or whoever he may be, tries it; on that Calendar there is the age of the prisoner. The age they all know has been given by the prisoner himself. It comes from the Governor. You will remember the Calendar is signed by the Governor of the prison, and he is responsible for the dates given there, and the ages given there, and that is the age he takes from the prisoner. That is what the Chairman works from. The convictions are in ten years. He is then 19, that is three years over the time. That is sufficient, that is the way in which it is worked, no objection being taken by the prisoner: "I was only sixteen when that first conviction was given"—no suggestion of that kind.

No.

Coventry: Sect. 17 of the Cruelty to Children Act, 1904, 4 Ed. 7, c. 15, has a similar point.

(*a*) In sects. 5, 6, 7 (48 & 49 Vict. c. 69) there is a proviso "that it shall be a sufficient defence to any charge under" the respective sections "if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years" (" eighteen" in sect. 7).

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Muir : At page 890 of Archbold (23rd edition) it says : "The effect of section 17 is that "Where the child appears to the Court to be under sixteen, it is for the defence to prove that the child is older." It is really an argument against myself, but I wanted the Court to be in possession of the fact with regard to that.

On the last question—that the sentence should be pronounced——

The Lord Chief Justice : We do not trouble you about that.

I am desired to point out to this Court with regard to the question of the proof of the consent of the Director of Public Prosecutions, that it is one of very great importance, from the practical impossibility of any witness going down to the country to prove the handwriting—to all parts of the country to Quarter Sessions.

I would ask your Lordships also to say on the authority of the case which I should have cited to you if necessary from Taylor on Evidence, that where it comes in reply to a letter sent to the Director of Public Prosecutions that would be enough. It is only in a difficult case that we should have to resort to it.

Coventry, in reply : With regard to the last point, my Lord, is not there this difficulty : my learned friend has to shew that the notice is sent within seven days, and he suggests the date of the letter will prove the time within which it is received—is not that contrary to the usual practice?

The Lord Chief Justice : We have not expressed any opinion on that point.

Grantham J. : Then someone gave evidence that he served the notice on the 4th.

It is not a question of serving the notice.

Channell J. : There is no practical difficulty about that.

If there was any evidence of the posting that would be quite

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sufficient; that would be some evidence that the letter was received some time afterwards.

The Lord Chief Justice: Practically speaking it will always be the evidence of the man who received it, and then he will know if he is in a position to prove the handwriting.

That is so. There is one point I wish to draw attention to—that is with regard to the seven days' notice.

Mr. Muir has cited two old authorities which are in direct conflict with a much more recent case, *In re Railway Sleepers Supply Co.*, which is in the 29th Chancery Division, page 204. That was a judgment of Mr. Justice Chitty, in which he reviews all the authorities, and it is perfectly clear there that wherever a party is given a certain space of time in which to do an act, which space of time is included between two other acts to be done by another person, both the days for doing those acts ought to be excluded in order to ensure to him the whole of that space of time. The words there were, "at an interval of not less than fourteen days."

May I comment on the case my friend has cited? Where a man has to do something within ten days, he has only the ten days including one and excluding the other, it is not the clear ten days; that is when he has to do an act within a certain time, but when somebody else has to serve a notice "not less than seven days," then the individual, according to all the authorities is given seven clear days before the act can be done of which he has notice. I think, perhaps, I ought to read to your Lordship the whole of the judgment of Mr. Justice Chitty, because it is very clear. I do not think I need begin right at the beginning of the case, but at the top of page 207 he says this: "Is the interval referred to, first, the whole period between the date of the first meeting and the expiration of the month; or secondly, only the earlier; or thirdly, only the latter portion of that period? It is not material, to my mind, to answer these questions beyond saying that it is plain, at all events, that the statute prescribes the interval which is to elapse between the date of the first meeting and the earliest time when the second meeting can be held. 'An interval of not

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less than fourteen days'" is equivalent to saying that fourteen days must intervene or elapse between the two dates. The relevant words of sect. 51 of the Companies Act, 1862 (25 & 26 Vict. c. 89), were " . . . at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed . . . at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days" from the former meeting—the words are really rather different. Mr. Justice Chitty has dealt, in his judgment, with notices in exactly the same terms as these.

It goes on to say: " Lord Tenterden's test, which is cited with approval by Lord Wensleydale in *Webb* v. *Fairmaner* (3 M. & W. 473, 477) and *Young* v. *Higgon* (6 M. & W. 49, 54), was to reduce the time to one day. Now, supposing the statute had said at an interval of not less than one day; if the first meeting were held, say on the Ist of January, the second meeting could not properly be held on the 2nd of January, for one day must intervene, therefore the 3rd of January would be the earliest day, and adding thirteen more days to make up the fourteen, the second meeting could not be held before the 16th. In the case of *Reg.* v. *Justices of Shropshire* (8 Ad. & E. 173) the statute required that notice of the grounds of appeal was to be given, fourteen days at least, before the first day of the sessions, and it was decided that the fourteen days at least meant fourteen clear days. Mr. Justice Littledale says (*ib.* 175): 'We must abide by what has been already decided, though it appears to me that a day is a day whether "at least" be added or left out.' In *Chambers* v. *Smith* (12 M. & W. 2) the words were, 'not being less than fifteen days.' The Court considered its judgment, and then decided that one of the days was to be reckoned inclusive, and the other exclusive, but not being subsequently satisfied with that decision, the matter was reconsidered; and the Court held that the words 'not being less than fifteen days,' meant fifteen all days or clear days. In *Young* v. *Higgon* a calendar month's notice was required to be given, and the Court held that the first day must be excluded from the reckoning. Baron Alderson in his judgment said: 'Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded——"

The Lord Chief Justice: Those cases are not quite the same, but the other part you read is directly in point. Two acts to be done at an interval are not quite the same. This prisoner has to do nothing here. You might say the officer of the Court has to put it into the indictment.

Then Chitty J. goes on: "and as Mr. Justice Littledale said in *Reg.* v. *Justices of Shropshire*, I do not see any distinction between 'fourteen days' and 'at least fourteen days.' I must come therefore to the conclusion that the resolution is bad," *i.e.*, the resolution passed on February 25th and confirmed on March 11th, 1885.

Grantham J.: That is the decision of Mr. Justice Chitty alone.

There the question was "at an interval" of fourteen days.

Grantham J.: It was his judgment sitting alone?

Yes, he cites all these authorities, but he does not seem to refer to the two authorities cited by Mr. Muir.

Grantham J.: I think that is very important. You say he refers to all the authorities. We have three judges in *R.* v. *Justices of West Riding* [p. 136, above], Mr. Justice Parke, one of the most able judges on the Bench, and we have Mr. Justice Littledale and Lord Denman. They go into the same point. It is the same as this,—where notice has to be given, unless it says so many clear days, one day is exclusive and one day is inclusive.

With the greatest respect it is entirely distinguishable. It deals with entirely different facts. It is a question there whether an individual has ten days for his own benefit in which to do a particular act, and when he has ten days within which to do a particular act of course he is limited to ten days excluding one and including the other, but where a notice is to be given by the

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other side and is given to an appellant then seven days' notice must be given, seven days' clear notice. That is laid down in the White Book on Ord. LXIV. r. 1, and Ord. LVIII. r. 3 (p. 921) in the clearest possible terms and the distinction between the two. Therefore you would not expect to see in the case of *In re Railway Sleepers Supply Company*, any allusion——

Grantham J.: I would rather rely on eminent judges than on anyone who writes the White Book.

If I may say so, I do not say these decisions are wrong, but they do not touch this point.

Grantham J.: They seem to me to be on all-fours with this.

Channell J.: Does not it come to this, that the principle has not been disturbed, that when you say a certain number it means inclusive of one and exclusive of the other, unless "clear days" is expressed or implied? Then the whole difficulty of the case is whether on the words of particular statutes you are to say it means clear days.

That is so.

Channell J.: I think that has not been departed from, but when you get to particular words, you have *Chambers* v. *Smith*, 12 M. & W. 2 (1843), which is quoted by Mr. Justice Chitty, —the words seem to be identical with the words in the present case.

Muir: Are not the words, so many days before a certain day?

The Lord Chief Justice: The Act (2 Will. 4, c. 39, s. 3) says, "Not being less than fifteen days after the teste thereof."

Where you introduce the word "before" or "after," that makes a different consideration.

Coventry: Your Lordship sees in the White Book the dis-

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tinction which is drawn between an act where a man is given the benefit of time and where it is the converse. If a man has fourteen days in which to deliver his defence, he has to do it in fourteen days or he will be out of time. If you are to give your opponent fourteen days' notice it must be fourteen clear days. The two sets of authorities do not conflict. I submit that those two cases in Nevile and Manning, which your Lordship (Mr. Justice Grantham) has before you, only deal with the case where a man has ten days for his own benefit, he has ten days in which to put in his notice of appeal, he has to do it in the ten days, excluding one and including the other, but it is very different where he has to give the other side seven days' notice. I think the authorities are quite clear those must be clear days. There is no case which qualifies this decision which Mr. Justice Chitty came to in *In re Railway Sleepers Supply Company* case; he reviewed all the authorities, including *Chambers* v. *Smith*. I submit that authority is clearly in my favour.

Channell J.: In *Chambers* v. *Smith* the Court in the first instance, as it appears in the judgment of Mr. Justice Chitty, said that it was inclusive of one and exclusive of the other, that subsequently a doubt was suggested about it, and Baron Parke ordered the case to be re-argued, and then he delivered the judgment on the re-argument, and he said: "In our former judgment, we said that 'not less than fifteen days' meant fifteen days, one exclusive and one inclusive; but upon looking at the statute 13 Car. 2, st. 2, c. 2, s. 6"—that is the one about teste of writs—"which recites that in actions commenced by original writs, it was necessary that there should be 'fifteen days at the least' between the day of the teste and the return of the writ, we think the words in the Uniformity of Process Act (2 Will. 4, c. 39) must be construed to mean fifteen full days." So that they go upon some previous statute with a similar object to the one they were construing which had got different words in it. I do not know if that makes it of general application.

Yes, Mr. Justice Chitty cites with approval *The Queen* v. *Justices of Shropshire*, where Lord Littledale said he saw "no distinction between 'fourteen days,' and 'at least fourteen days.'"

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The Lord Chief Justice: There is no doubt "clear days" or anything of that kind excludes both. The whole point is whether this statute "not less than seven days' notice" also excludes both.

Channell J.: Suppose you were to apply the excellent test which one of the judges did, reducing it to one day. Suppose this was "not less than one day" from to-day, would it do to give you notice to-morrow?

No, that shews the fallacy of my friend's argument, because the law does not recognise fractions of a day.

The Lord Chief Justice: I am much obliged to you. You are arguing in the general interest of prisoners, because your client does not care about this.

This does go to the merits of the case, because there were not seven days. If we were to reduce it to the test of one day, and that he should have not less than one day, then it makes it perfectly clear that you could not try him to-morrow.

Channell J.: There are authorities for saying where you have words of that sort that necessarily imports that you may go into hours—there are commercial cases to that effect. "Not less than one day." You could prove what hour on the first day and what hour on the second.

There may be exceptions to the general rule, but the general rule is the law does not recognise fractions of a day.

Channell J.: Undoubtedly, but there are demurrage cases which deal with that point, and shew if you use an expression like that you do mean to make a day of twenty-four hours.

That, of course, goes to the intention of the parties. I submit if you reduce it to one day, it must be a clear day, because the law does not recognise fractions of a day, and if there is a notice that a man must be tried in not less than one day, he could not be tried to-morrow. If you multiply that by seven you get seven clear days between the giving of the notice and the trial.

There is one other point as regards the grounds which have to be stated in the notice.

The Lord Chief Justice: We need not trouble you about that.

If your Lordship pleases.

Then the only other point I want to mention is the question of the man's age. I think it would be introducing quite a novel procedure to suggest that the Calendar was any proof of a man's age.

The Lord Chief Justice: Certainly not a novel procedure; you may say a defective procedure. I am sorry to say I have acted on the Calendar with regard to a man's age scores of times.

Since I have been in Court my attention has been called to a very serious discrepancy that there was between the correct age of a certain man and that which was put in the Calendar, and I know this of my personal knowledge the Governors of gaols will not vouch for the ages of prisoners in the Calendar.

Grantham J.: They cannot vouch for the accuracy of the statements made by the prisoners.

Channell J.: Will they not vouch for the fact that that was the age that they have been told?

Yes, my Lord, but not if it has come second-hand from the police. I am not suggesting for a moment if somebody had gone into the witness-box and said: "The prisoner admitted he was twenty-nine when I arrested him," that would not have been amply sufficient. There must be some evidence—that is what I submit—and in this case there was none.

Channell J.: My Lord has requested me to give the judgment upon these points, and it is to be observed in the first instance that it is somewhat unfortunate that in an Act of Parliament of this kind more care was not taken either to provide for the machinery, by which the proof was to be given upon these various points, or, to do what, of course, is so very often done in modern Acts of Parliament, namely, to provide for rules to carry it out, in which case rules might have been made which would have provided for almost all the difficulties which have been suggested in this present case and which have been suggested probably to almost all the judges who have been sitting for criminal work since the Act came into force. But, of course, one has got to deal with it as it stands and to give the best judgment we can upon the points which, unfortunately, have arisen, although, as I say, it is somewhat unfortunate that they should have, because they are all matters which could have been provided for quite easily in the Act, and if there is any real difficulty upon them, could be provided for now by a supplementary Act, or by an Act authorising rules to be made on this subject.

Now, dealing with the questions in the order in which they appear in the Case stated from the Worcestershire Quarter Sessions.

The first question of law stated there is :—

> " (1) Was the direction that the jury should be sworn as in cases of felony when the charge to which the prisoner had pleaded guilty in the indictment was felony, correct? or how should the jury be sworn?"

The Court is clearly of opinion that there is no objection to the course taken in that case of swearing the jury as if for felony. The effect of it was to give the prisoner challenges upon this point, but if it is of importance, it is of very little importance really, how the jury should be sworn in the comparatively few cases where the prisoner pleads guilty to the first charge against him but pleads not guilty to this additional matter, namely, that he is a habitual criminal—it is not a matter of very great importance, but we all think that the argument of Mr. Muir is correct, that this is not, in itself certainly, a felony, that it is a mere sort of issue of fact to be proved, and that it would be sufficient to swear the jury in the ordinary way as for misdemeanour only, in the cases when it arises, but certainly there is no objection to swearing the jury as for felony when the principal charge is felony.

The next question is stated in a way that only relates to this particular case, but it is agreed that it is intended to include in it a much more general question. The question, as stated in the Case, is:—

> "(2) Was it necessary that the whole of the letter and all the contents received by the Chief Constable from the Director of Public Prosecutions should be put in evidence or could one of the enclosures be put in evidence without the rest?"

It is very clear that it was not necessary if only you have got the document that was enclosed, and if you have got proper proof of that—it was quite unnecessary to put in the letter which did enclose it. But, of course, in the particular case it was that letter which enclosed it which apparently was to be used as a proof of the document; and that it is which raises the more general question as to how the particular document, that is the consent of the Director of Public Prosecutions, should be proved. Now the Court is of opinion that it is necessary to have some proof—that a document produced purporting to be signed by the Director of Public Prosecutions should be proved. There happens to be no statute authorising a Court to take notice of the signature of the Director of Public Prosecutions. If any further Act is to be passed, it might be very convenient to put it in that shape, but there is none at present, and consequently proof must be given of the document; but it is not necessary that that proof should be proof by somebody who says: "I have seen Mr. Guy Stephenson write, and I know his handwriting, and this is his handwriting." The Court is of opinion that proof of that kind is not necessary; and we cannot lay down any general rule as to exactly what would be necessary in every possible case; but in the view of the Court it is sufficient if somebody, for instance, who has been in correspondence with the Director of Public Prosecutions says: "I received this in ordinary course, and I believe it to be signed by the Director of Public Prosecutions." In the ordinary way, of course, we all know there is a solicitor in the country, as a rule, instructed to prosecute, and who is conducting the prosecution. Sometimes he is agent of the Public Prosecutor, if it is a case prosecuted by the Public Prosecutor, but he has to get that consent of the Public Prosecutor, and, in our view, it is sufficient if he proves that he has been in correspondence with the office of the Public Prosecutor, and he has got this document in the regular and ordinary course, and to the best of his belief it is the genuine document—that will enable

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the proof to be given, in the great majority of cases, without much trouble. All that the Court say is, that there must be some kind of proof of it, but it must not necessarily be proof of somebody who says: "I have seen the gentleman write," which, in the old-fashioned days, at any rate, was the technical way of proving the signature. Of course, the way that Mr. Muir suggests, namely, the proof of the previous writing of a letter requesting the consent, and the consent coming in answer to it, would be one way of doing it—one of the ways which I have indicated in somewhat more general terms. What the Court says is, there must be some kind of proof of that, but it need not be proof of a person who is able to say, "I have seen the gentleman write, and in that way know his handwriting."

The next question is:—

> "(3) Was it necessary that the Clerk of the Peace should be called and sworn to produce the original notice sent to him by the Public Prosecutor?"

It was not necessary that the Clerk of the Peace himself should be called to do it, but there must be some proof of the receipt of the notice. It may be, of course, by an officer, a clerk to the Clerk of the Peace—somebody in his office; it may be by the person who gave the notice; but in some shape or another, it is a matter of evidence; it is a fact to be proved. Under the terms of the statute the indictment may not be presented unless it is proved—and it has got to be proved, and it has got to be proved by sworn evidence of somebody.

A suggestion was made, I think, by me in the argument that this might possibly be treated as a part of the records of the Court, and upon its production it might, as it were, prove itself; but I think the Court is of opinion that that would not be sound; it is a notice to the Court rather than a document of the Court itself, and it has to be proved.

As my Lord is good enough to remind me—I was passing it over—the date of the receipt cannot be taken from the document itself, and it is the date of the receipt that is the important point, and that is one reason, and a very important reason, why the fact of the receipt has got to be proved, because the date of it has got to be proved.

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Then:—

> "(4) Was I right in refusing to allow secondary evidence to be given of the contents of the notice served upon the prisoner?"

We all think not. It is a general rule that you have not to give notice to produce a notice. That is a general rule. I have always understood it was because, if you had to give notice, you would have to give notice to produce that notice, and so on *ad infinitum*, and I think that is the foundation of the rule. At any rate, it is a perfectly established principle that, when you have got to give a notice, and you give it in a written document, as you generally do, even if it is not absolutely necessary to do it, as it commonly is, you have not to give notice to produce that notice; you prove the fact of the notice without doing so. Therefore, in this case, the learned Chairman might have received evidence of what the notice served upon the prisoner was without the prisoner having had a notice to produce it. That is the answer to question 4.

> "(5) Was the service of the notice on the 4th October, the Sessions being held on the 11th October, a sufficient notice within sect. 10 of the Act?"

Sect. 10 of the Act on this point is, "not less than seven days' notice has been given to the proper officer of the Court." This point is the one which I think has given us most trouble; certainly it has given me most trouble. There have been, as everyone knows, in fact, decisions upon points similar to this which are not exactly in accord. Of course, they depend upon words of different statutes, so that they may all of them be right and yet bring about apparently different results. But we have come to the conclusion that the case which is most nearly in point upon this point is the case in 12 Meeson & Welsby, which was referred to by Mr. Justice Chitty in the case in the Chancery Division, where he reviews all the cases down to that point. The Chancery case was *In re The Railway Sleepers Supply Co.* in 29 Ch. D., but after quoting a very considerable number of cases, he refers to *Chambers* v. *Smith*, in 12 M. & W. at p. 2, and there the words are, "not being less than fifteen days," and those are the exact words in this statute, "not less than seven days." In that case

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of *Chambers* v. *Smith* the Court in the first instance came to the conclusion that they came within what I think I may say is the ordinary rule, namely, that when you have got a number of days specified, they are to be reckoned exclusive of one of the days and inclusive of the other unless clear days are expressed. I think that is the real rule, but the difficulty in all the cases is to see whether the words of the particular statute, which you have got before you, do express clear days. In the case of *Chambers* v. *Smith*, in 12 M. & W., the Court after having in the first instance thought that the words "not less than fifteen days" were to be construed in the ordinary way, one inclusive and the other exclusive, on re-consideration came to the conclusion that they were to be construed that "not being less than" meant clear days. That being the statute upon which the words are nearest to the present one, we come to the conclusion that in this statute "not less than seven days" means "seven clear days," and we so answer that question.

It follows, I think, that in this particular case the notice was an insufficient one. What we should have held would have been the effect of that upon the conviction, if it had been the only matter, I do not know.

Now we come to question 6, which is probably the most important of the questions in this case so far as the merits of this particular case are concerned. That is:—

> "(6) Was the conviction dated the 22nd October, 1900, or the other convictions proved admissible in evidence, there being no evidence to shew that they were the convictions mentioned in the notice?"

Now, of course, the difficulty arose in consequence of the Chairman having excluded the secondary evidence of the notice that was served upon the prisoner. The result was there was before the Court no evidence of what convictions were in that notice, and, therefore, there was no evidence that this particular conviction which was mentioned, which it was proposed to prove against the prisoner, was a conviction of which he had had the requisite notice, and this giving of the notice to the prisoner is undoubtedly a very important matter, which must have been deliberately introduced into this Act of Parliament for the protection of the prisoner, and in order that he might know what the convictions were that it was proposed to prove against him and to give him time, if he alleged that he was not the man who had been so convicted, to make some inquiries about it, and to give notice and so on, and generally to prepare his defence upon the point.

This matter, of course, only arises in this particular case; it is not a matter of general application, but upon the facts of this particular case it is quite clear that those convictions could not be proved against this prisoner, because there was no evidence that he had had notice that they were going to be so proved.

Now the next question :—

> " (7) Was it necessary to prove that notice was given to the prisoner of the evidence to be called to prove he was leading a persistently dishonest or criminal life?"

The provision of the statute upon that is, that not only not less than seven days' notice shall be given to the proper officer of the Court, &c. . . . but " the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge." The charge against him of being a habitual criminal is not to be found against him unless the jury find on evidence that since attaining the age of sixteen years he has been three times convicted, and that he is leading persistently a dishonest or criminal life. Those are the ordinary matters. There is a separate sub-section of section 10 (2): " (b) That he has on such a previous conviction been found to be a habitual criminal." (b) is a matter which would not often arise; it cannot arise at present; it cannot arise for some three years hence, then it may have to be considered.

As to this, the Court is clearly of opinion there is no obligation to state the evidence, and that if you treat this question literally, " was it necessary to prove that notice was given to the prisoner of the evidence to be called to prove he was leading a persistently dishonest or criminal life?" that is not wanted; but what has to be stated is the ground upon which it is intended to found the charge; and the Court is of opinion that that must be given in a real and substantial form, that he must be told the grounds, and that it is not sufficient to say—We propose to prove that you have been persistently leading a dishonest life, or that you have been persistently leading a criminal life. The distinction between those two things put by Mr. Muir is that a man may have been leading a criminal life if he is constantly committing assaults, or something of that sort, without his leading a dishonest life. I am not at all sure that that is what was meant by the conjunction of those words in the statute; but whether that is so or not, in the opinion of the Court it is not a sufficient ground to say that what we mean to say is that you were dishonest, or what we mean to say is that you were criminal without being dishonest.

The grounds must be stated, only they must be stated in a general way as grounds, not as evidence: that you are a habitual associate of thieves; that you are doing no work and have no visible means by which you are earning an honest livelihood; or, that you are doing now the very same thing that you did years ago and were convicted for. I should think, taking Mr. Muir's case of a man who committed an offence immediately he got out of the prison gates, that it would be sufficient to say that: We charge you with being a habitual and persistent criminal because the very moment that you come out of gaol you commit this new offence that you are now charged with; but, whatever it is that is proposed to be relied upon, the grounds must be stated in some general way, and it is not sufficient merely to say in the words of the statute, we are going to prove that you are what the statute says you must be.

The 8th question is:—

> "(8) Was I right in admitting evidence of the prisoner's dishonest or criminal life previous to the last conviction, or should the evidence be confined to proving that the prisoner was leading persistently a dishonest or criminal life since his release from prison after his last conviction?"

Now what has to be proved is that he is leading persistently a dishonest or criminal life. That is, the evidence against him must be brought down to date—that is the important thing, and that is necessary, but upon the general question whether you can go back to prior events and his prior life,—that, as my Lord has pointed out during the argument, must depend in each case on the facts of each case. It is somewhat similar, not so important of course, to the question which constantly arises nowadays, whether in proof of one offence you can give evidence which involves that the person has committed another offence; it is very similar to that; there may be cases where upon the facts you have to do it, and in these cases it very often may be extremely important to prove that he is now, at this esent time, doing precisely the same thing that he used to do when, beyond doubt, he was a habitual criminal; and consequently we cannot say as a general proposition that evidence of something of his way of life prior to his last conviction is inadmissible. If you had only got that it would not prove the issue, that is quite clear, but it may be a step towards proving the issue. Therefore, one cannot say that it is necessarily inadmissible.

Then :—

> "(9) Was it necessary that evidence should be given to prove that the prisoner was over sixteen when the first conviction took place?"

Now in order to bring the man within the provisions of this statute it has got to be found against him by the jury that he has been convicted the three times since he was sixteen years of age. As that has got to be proved before the jury they must find it; I mean, as it has to be found by the jury, they must find it in a proper way, but there may be cases where there is no possible doubt about it; the convictions proved against the prisoner, three in number, may have all been in the last year, and it may be perfectly obvious to everybody that the prisoner is very considerably over sixteen years of age at the present time, and, therefore, must have been over sixteen last year when he had those previous convictions. Therefore, there are cases which there is not the slightest difficulty about, but somehow or another it must be proved, and when the prisoner is of an age to make it doubtful whether he may not have been under sixteen at the date of the first conviction which is put in against him, then you want some kind of evidence beyond doubt; but the fact that the prisoner has stated that he is a particular age at a particular time will be sufficient, it is evidence against him that you have got.

Therefore, dealing with the point, that you would usually use as a practical test, namely, the age that is stated in the Calendar, as to that that comes entirely from statements given by the prisoner himself. I think, as I understand the practice, the Governor of the gaol is responsible for the Calendar, and that that is equivalent to saying that the prisoner gave his age at such an age; but in all cases where the jury would not be prepared to act

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upon their view in the matter, it seems to us that that has got to be proved. If the Governor of the gaol were to come and say, I cannot recollect whether I examined this man myself, but in the course of our proper procedure the man, when he comes into gaol, gives his age, and this is what is given to me as his statement, I am inclined to think that would do, because the official comes and says this is the age reported to us as the prisoner's age by himself, and that kind of evidence would do; but in all cases where the view would not be sufficient, then some kind of evidence has got to be given.

I think that is the answer to that question.

Then :—

> "(10) Should the sentence on the first count of the indictment have been given before the prisoner was placed on his trial as a habitual criminal ?"

The Court are clearly of opinion that is not so, there are very obvious reasons for saying that could not be so.

The true facts that are going to be proved on this charge of being a habitual criminal are the facts that the Court always wants to inquire about before they give the sentence, and it would not be possible that the statute could mean that that sentence must be given first.

I think that answers the whole of the questions that have been put to us in this Case.

The general result is that the conviction of this prisoner as a habitual criminal and the sentence of detention following it, of course, will be quashed.

The LORD CHIEF JUSTICE: The three years remain.

Conviction as habitual criminal and consequent sentence quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GRANTHAM AND MR. JUSTICE CHANNELL.

JAMES JONES.

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James Jones.

Murder—Circumstantial evidence.

This was an application (referred to the full Court) for leave to appeal against conviction at Warwick Assizes, on November 17th, for murder of a five year old child, before Pickford J., who passed sentence of death.

F. J. Sawyer for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of the murder of his child, aged five years, by throwing it into a canal on September 15th, but the verdict was against the weight of evidence. The actual killing was never proved, and the circumstantial evidence was not overwhelming.

About 7 p.m. on September 15th a man was seen by a witness walking from Birmingham along the towing-path near the Canal Office, Tyburn. He had hold of a child's hand, and after they had passed the witness about fifteen yards the child was heard to say "Oh, Dada!" Twenty minutes later appellant was seen five hundred yards further away, kneeling by the side of his dead child. He was crying, "Oh! my baby; God forbid that this should have happened!"

There was only one witness present at the time of the alleged murder who saw appellant jump in off the bank. That witness was six yards away, and said that he could see appellant jump in, but could not say whether or not he had a child in his arms, as it was too dark. Witness saw appellant struggling to get back to the bank, and threw him a rope, and when pulled to the side he was seen to be holding the child.

He at once said, "I jumped in to save my baby," and this was his explanation throughout.

It was suggested by the prosecution that appellant had threatened to commit suicide, but the evidence of words spoken by appellant on dates unspecified only amounted to remarks of a very jealous man and of a man in a temper. There were never any threats to drown the child. It was true that the first witness deposed that he said "if anything happened to him, he hoped the child would go at the same time—he was so fond of her;" and "when he was in a temper he said he would go away and drown himself"; but the witness subsequently answered that "No one seriously considered him likely to commit suicide."

In summing up the learned judge said: "The question is, are you satisfied that the prisoner took the child into the water for the purpose of either drowning the child, or drowning himself; because there is no case made here of his having negligently taken the child into the water or allowed it to get into the water in circumstances that would amount to manslaughter. The case for the prosecution which they have undertaken to prove, is that he purposely took the child into the water." But appellant said that he jumped in to save the child, who fell in.

[The Lord Chief Justice: That alternative case was properly left to the jury.

Grantham J: It was a still night, and there was no current, no tide or wash. The canal was not deep, and the child was in the middle of the canal. She could not have got there by herself.]

A barge had just passed by, and that might have caused a wash. Also it was impossible to say how long she was in the water. The killing of the child was not proved.

The Lord Chief Justice: The questions raised in this case were quite properly left to the jury. The circumstances of the case all went to prove the impossibility of the child having fallen into the canal, and appellant having jumped in to save her. In our opinion the conviction was right.

Application dismissed.

SAMUEL ATHERLEY.

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Samuel
Atherley.

Murder—Where a defence of insanity has been suggested but not proved, and has not been accepted by the jury, this Court will not interfere.

This was an application for leave to appeal against conviction at the Nottingham Assizes on November 12th, for the wilful murder of Matilda Lambert, at Arnold, on July 10th. Sentence of death was passed by Pickford J.

Appellant pleaded not guilty. He had served for some time in the army and in India, and had been living with the murdered woman for six or seven years. They quarrelled at times, and at times the woman had stayed a night or two with her sister, but there did not seem to have been any very serious quarrel, because she always went back again after a day or two, until quite shortly before the woman was killed, when he complained of her misconduct with some man at a time when she was, as a matter of fact (according to the witness to whom he complained), upstairs with appellant. The three young children slept in the same room with their mother—the little girl with her mother, and two little boys in another bed.

Appellant also complained to the same witness about her brother-in-law saying that he was the father of the youngest child.

Two days later he cut the woman's throat and all the children's throats. He also fractured the heads of the woman and two of the children with a hammer. His own throat was also cut. On the way to the hospital he said: "It is through jealousy. I killed them at three o'clock in the morning. I broke my razor over them. I then fetched another to do myself, which I threw at the back of the bed. I lay lingering until I rapped at the window."

E. H. L. Hadfield for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was not present.

The plea of insanity was set up.

No solicitor appeared on behalf of the prisoner, and no counsel was instructed at the trial, but at the request of the Judge in Court I defended him. It was then impossible to get evidence to shew that he suffered from delusions, and I had no opportunity of putting

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such evidence before the Court, though it appeared that he was invalided home from South Africa, a complete wreck.

The jury were undecided, and if there had been some slight evidence of insanity, that might have turned the scale.

The Lord Chief Justice: It is unnecessary to say that the suggestion of insanity must be established to the satisfaction of the jury. The facts were properly left to the jury, and they did not find that appellant was insane. It is quite impossible to ask this Court to reverse this judgment, where all the facts were put properly to the jury, upon the ground that there might have been some other evidence available. A great deal may be said here in favour of the defence of insanity, in view of the nature of the crime, and no doubt the learned judge's suggestion to the proper quarter will receive consideration.

Application dismissed.

Albert Asquith Jackson.

ALBERT ASQUITH JACKSON (*a*).

Extension of time granted to raise a point of law.

This was an appeal from an order of Mr. Justice Hamilton refusing—

(a) an extension of time for appealing against conviction; and

(b) leave to appeal against sentence.

The appellant pleaded guilty at Stafford Quarter Sessions, on October 19th, 1909, to an indictment charging him with the common law misdemeanour of having on the 9th June last, at Burton-upon-Trent, sold certain obscene prints—namely, seventeen photographs—and was sentenced to six months' imprisonment with hard labour.

F. W. Sherwood, for the appellant, said that there had been

(*a*) See p. 192, below

some delay on the appellant's part in making up his mind to appeal, and he was two or three days out of time.

The sentence was much too severe; he (counsel) had urged at Quarter Sessions strong circumstances of mitigation which, in his view, ought to have affected the sentence, and which the Court would certainly think relevant for that purpose. These circumstances were not taken into account. It was almost a settled rule of the Stafford Sessions for counsel for the prosecution not to interpose on the question of sentence, except upon the invitation of the court. The court made no enquiries as to the circumstances in question; so it must be assumed that the sentence was given without regard to them, though they clearly were most pertinent to the question of sentence.

It is also submitted that the sentence is also open to objection on a ground of law, inasmuch as the Court had no power to impose hard labour. If so, the appellant would have an absolute right of appeal, and for that purpose, no doubt, the Court would extend the time for giving notice. It had been assumed at the trial that hard labour could be imposed, but the depositions shewed that appellant merely sold the photographs, and that there were no such additional circumstances as the selling publicly or the exposing of the photographs to view or the exposing for public sale. The bare offence of selling was a common law misdemeanour and not punishable by hard labour; by sect. 29 of 14 & 15 Vict. c. 100, the Criminal Procedure Act, 1851, certain common law misdemeanours were made punishable with hard labour, including "any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition." It is submitted that in this case there was no such public selling; there was only a private sale.

[The Lord Chief Justice: The indictment contains several counts.]

I did not look at the indictment, because I was furnished with what purported to be a transcript of it, supplied by the Clerk of the Peace. According to that transcript there was an indictment of only one count, charging a common law misdemeanour. If it should prove that, through inadvertence, appellant pleaded guilty to a count alleging a public sale, he certainly did not mean to do

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so. I never intended to allow him to do so. No such charge, it is submitted, could have been supported on the depositions.

The LORD CHIEF JUSTICE: You may have extension of time to raise the legal point, and leave to appeal generally.

Applications granted.

Solicitor for appellant: *R. W. Skinner*, Burton-on-Trent.

William
Johnson.

WILLIAM JOHNSON.

A jury may infer guilty possession of counterfeit coins if defendant is found to be acting in concert with another who is in actual guilty possession.
Severity of sentence.

Appellant, John Smith, and Kirby, were charged at the West Kent Quarter Sessions, Maidstone, on October 21st, 1909, with unlawfully and knowingly uttering one false and counterfeit coin resembling a florin, also with having in their possession thirty-seven false and counterfeit coins, resembling florins, at Yalding, on the 15th September, 1909. John Smith was acquitted, but appellant and Kirby were convicted. Appellant was further convicted of being a habitual criminal within the Prevention of Crime Act, 1908, and was sentenced to five years' penal servitude, and five years' preventive detention. His application for leave to appeal against the primary conviction was referred by Bucknill J. to the full Court. He also appealed against the second sentence, and applied for leave to call further evidence.

R. A. Gordon for the appellant (under sect. 10 of the Criminal Appeal Act), who was present.

A distinction should have been drawn by the Chairman in summing up between the two counts in the indictment, viz.: (a) the uttering count (under sect. 9 of the Coinage Offences Act, 1861, 24 & 25 Vict. c. 99), and (b) the count for having in possession (under sect. 11 of that Act). A person found guilty of the latter offence is liable to penal servitude. If he is found guilty on the "uttering" count only, the maximum punish-

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ment would be one year's imprisonment with hard labour, and the count as to being a habitual criminal could not be proceeded with.

All three men were charged jointly with the same offences, but the evidence shewed that Kirby, who was convicted, was found with all the coins on him. It was true that appellant was alleged to have previously uttered one of the coins, but he was not found in actual possession of any coins.

In the summing-up the learned Chairman said: "With regard to the prisoner Johnson, you have the fact that he came down into the public-house with the other two prisoners, that he there offered a florin in payment of three glasses of beer, and that florin the landlord tells you he cut—which Johnson denies—and found it to be a bad one, and he then went for the police. Therefore Johnson is found passing a false coin similar to one found upon his companion. Beyond that Johnson is proved to you on a previous occasion attempting to pass five bad coins in Paddock Wood Post Office, and though the mistress of the post office is not able to identify him herself, yet you have the Detention Officer, who tells you that he saw Johnson passing this money.

"Therefore so far as Johnson is concerned, he is found passing false coins at Yalding on the 15th, and to have attempted to pass false coins on the 8th, and also, although that does not go for much, he was sitting at the end of the seat where the other four, five or six florins were found.

"With regard to Kirby, he is found with a large number of false coins upon him, and he must give you some better account of how he came possessed of them, than picking them up in a train."

In other words, this was an intimation to the jury that appellant was guilty on the uttering count alone, and the jury should have been asked on what counts they found Johnson guilty, instead of being allowed to give a general verdict.

If the Court now took the view that Johnson was guilty of "uttering" only, appellant desired to call fresh witnesses to prove that he was not the man who was alleged to have passed off bad coins at the Paddock Wood Post Office, and thus negative guilty knowledge. It was submitted that the jury did not intend to find him guilty on the possession count, but merely of "uttering." At the trial appellant was not defended by counsel, and he has three witnesses who would say that he was in London during the week of the previous alleged uttering. It was true that there was the uttering of the particular false coin on September 15th, but there was no evidence of a guilty uttering. It was true that in some respects the coin resembled the other thirty-seven counterfeit florins, but there was no evidence that they were exactly similar, and admittedly false coins had been circulating in the neighbourhood, coins of which any one might become possessed.

The learned Chairman confused appellant and the prisoner Kirby, in distinguishing them from Smith. Concerning Smith he said to the jury:—

"His position is very different to that of the other two (viz., Johnson and Kirby). So far as the other two are concerned, I think you will have little doubt at arriving at a conviction (*sic*). I am bound to say that a man who has this large amount upon him and is dealing with another man in a public-house, and has also dealt in a neighbouring post office in the same way—in such a case I do not think you will have any difficulty."

That amounted to a misdirection, for there was no evidence of appellant (Johnson) being in possession at all.

Morton Smith, for the Crown: The three prisoners were seen to alight from the 5.21 train at Yalding Station on September 15th. They then went straight to the "Railway Inn." There Johnson, who when searched had no false coins upon him, attempted to pass off a counterfeit florin. Directly afterwards the three prisoners were detained at the station in the waiting-room and searched. Upon Kirby were found thirty-one florins, some having the same date and being in other respects similar to Johnson's florin. They were wrapped up in a package, and were counterfeit. Johnson said he had thrown his coin away to save further trouble, but two hours afterwards six others were found in a handkerchief at the back of the seat in the waiting-room where the three men had been sitting. The handkerchief was nearest to the seat Johnson had occupied.

If these prisoners were acting in concert, that was sufficient "being in possession" of the coins. The jury had all the facts before them, and had to be satisfied before they found appellant guilty that he was acting in concert with the others. This was impressed on them both by counsel for John Smith and by himself, and must have been present to their minds; therefore there was no need for the Chairman to repeat it.

Gordon, in reply: The jury might have come to a different conclusion as to whether appellant was acting in concert, and the case against him was not properly put to the jury.

Dealing with the question of preventive detention as a habitual criminal under the Prevention of Crime Act, 1908, counsel argued that the provisions of sub-sect. 2 of sect. 10 had not been complied with. Proof should have been given that prisoner was over sixteen when the first of the three convictions proved against him took place.

Morton Smith: I asked the inspector whether at the date of the first conviction he was over sixteen years of age, and he said "yes."

[CHANNELL J: That is sufficient, and is an additional mode of proving the fact to those I mentioned in *Turner* [above, p. 161]; but there is other evidence to the same effect from his convictions.]

Counsel asked for reduction of the sentence of five years' penal servitude, as this was appellant's first offence with respect to coinage.

The LORD CHIEF JUSTICE: In this case the appellant was convicted on the count for uttering counterfeit coin, knowing the coin to be false and counterfeit, as well as on the count for being in possession of counterfeit coins. The jury could not do otherwise than find him guilty of the uttering. Mr. Gordon suggested that there was not sufficient evidence for the jury that he knew that the coin was counterfeit, but there was evidence that he had attempted to pass off counterfeit coins the week before at Paddock Wood Post Office. There was also evidence before the jury that the whole party were acting in concert, and in these circumstances he was rightly convicted of the major offence of "being in possession," as well as of the minor offence of uttering. We have before us the evidence of the Detention Officer and the Paddock Wood postmistress as to a previous attempt to pass counterfeit coin. Appellant's request to call other witnesses cannot be allowed.

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26 *November.*

William Johnson.

As to the conviction as a habitual criminal, appellant was over the prescribed age of sixteen, and therefore the conviction must stand. If this Act is to be of any real service, preventive detention should commence at an early age. It has been suggested that the term of penal servitude imposed before the preventive detention period is too long, but the period of five years does not seem so to us. In 1903 he was convicted of robbery with violence, when he was sentenced to twelve months' imprisonment with hard labour and twelve lashes; and in 1905 he was again convicted, under the name of Lawless, for robbery with violence, and sentenced to a term of five years' penal servitude.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL,
AND MR. JUSTICE COLERIDGE.

HENRY FOSTER.

1909
2 *December.*

Henry Foster.

Procedure on the trial of a "habitual criminal" under s. 10 *of* 8 *Edw.* 7, *c.* 59 (*The Prevention of Crime Act*, 1908) (*a*).

The jury are entitled to find that a prisoner "is leading persistently a dishonest or criminal life" within that section, though he has only been at liberty a short time before the primary charge they have tried was preferred.

This was an appeal against sentence, passed by the Chairman at the County of London Sessions on November 5th, of three years' penal servitude and five years' preventive detention.

Prisoner pleaded not guilty to a charge of breaking and entering a dwelling-house and stealing therefrom a clock and other articles. He was found guilty, and was then charged with being a habitual criminal. To this he also pleaded not guilty, but was convicted.

Alfred Bucknill for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. In the first place appellant wished to appeal from the order of Hamilton J. refusing leave to appeal against his conviction for the larceny. The evidence against him was mainly that of a man named Brown, who had pleaded guilty to the same offence, and it might be submitted that there was not sufficient corroboration of Brown's story to support a conviction. Such corroboration as there was, was equally corroboration of appellant's version of the facts. With regard to appellant's conviction as a habitual criminal, from sect. 10 (2) and (4)

(*a*) See *Turner*, p. 103, above; ar *Walter*, on December 10th, below.

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Henry Foster.

of the Prevention of Crime Act, 1908, it was clear that there must be:—

(a) Some evidence that the man is habitually leading at the time of the present offence a dishonest life; and

(b) Some evidence—

(1) That the consent of the Public Prosecutor has been given.

(2) That the proper notices have been given within the proper time.

(3) That the notices contain the facts which must be set out therein.

With regard to (a), it appeared from the evidence of the police officers that the appellant had been convicted of felonies in 1901, 1905 and 1906. It was true that he was sentenced on the last occasion to four years' penal servitude, and that previous to the year 1890 there were a considerable number of convictions against him. But appellant had left prison after serving his last sentence only six days before he was arrested on the charge in respect of which he was at present before the Court. No evidence was given as to how he spent these six days, but in the course of the trial for "breaking and entering" there was some evidence that on the day in question he was endeavouring to sell some brooms. Brown himself said that when he went to find appellant, he found him selling brooms. Brown was clearly the moving spirit, and took all the principal steps in the larceny. The learned Chairman, in summing-up to the jury, did not deal with the man's life during the six days before his arrest, and he simply mentioned the previous convictions to them, and asked them to decide the question whether the prisoner had habitually led a dishonest life.

With regard to (b), no evidence was given at the trial that the consent of the Director of Public Prosecutions had been obtained. And if the Court were of opinion there was no substantial grievance in the absence of that consent, there remained the other formal objections. No evidence was given that the proper notices had been served within the proper time upon the officer of the Court or upon the appellant, and no evidence was given as to the "contents of such notices," if any. The Chairman only stated in the course of the trial that the proper notices were in Court.

The appellant, who was not represented by counsel, took no objection at the trial to the absence of this evidence.

[Lord Coleridge J.: And in your appeal you have not set out any of these grounds.]

H. G. Rooth, for the Crown, was not called upon.

The Lord Chief Justice: With regard to the appeal against conviction, we are clearly of opinion that there was evidence upon which the jury might come to the conclusion that the prisoner had taken part in the larceny. There was corroboration, and there is therefore no ground for interfering with the decision of Hamilton J., who refused leave to appeal against conviction. With regard to the five years' preventive detention, counsel contended that in the summing-up to the jury the prisoner's life before his arrest had not been fully discussed. Nothing was said in the summing-up about his few days of liberty, but even with a full direction the jury could not have come to any other conclusion. And it seems quite obvious that appellant has not abandoned his mode of life. The sentence is the lowest which could be inflicted, and we cannot interfere with it.

Appeal and application dismissed.

SIDNEY VIRGIN.

Sidney Virgin.

Severity of sentence.

This was an appeal by leave of Hamilton J., against sentence of three years' penal servitude passed by the Chairman of the Somerset Quarter Sessions (Sir Edward Fry), held at Wells on October 27th, when the prisoner pleaded guilty to stealing a coat, tobacco pouch, pipe, card case, and a pair of cycle clips, the propeity of Arthur Edward Tarrant, at Troll, on the 1st July, 1909.

Appellant, in person, read a statement. He was starving at the time, and stole to get food for his wife; his sentence was not commensurate with the valne of the property (10s.) stolen; he had not been defended by counsel. He also stated that he had been out of employment for some time.

F. E. Weatherly, for the Crown. The prisoner has made the same plea that he made before Sir Edward Fry. I was then instructed that there was no reason to doubt the truth of what he said. There were, however, seven previous convictions, although, with the exception of the last one, none are of a very serious

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Sidney Virgin.

nature. The last conviction was for housebreaking, January 1st, 1908, when he was sentenced to nine months' imprisonment with hard labour.

The Lord Chief Justice: Prisoner has been sentenced to three years' penal servitude by a lawyer of great experience and humanity. We entirely appreciate the argument that short sentences do no good in many cases, and that the justices thought a long sentence was in this man's interest. That is the reason of the Prevention of Crime Act, 1908. Hence we interfere with this sentence with very great hesitation.

But there is a good deal to be said in mitigation, and we have received a memorial from the learned Chairman. Appellant is a married man with a family, and was in want. He stole a coat and other articles to the value of about 10*s*. It is true that as recently as 1908 he was sentenced to nine months' imprisonment for housebreaking; but, having regard to the nature of the offence and the circumstances of the case, we think that the sentence of three years' penal servitude is too severe. If in any circumstances he is found breaking the law again, the same leniency will not be shewn to him.

We think the sentence should be reduced to nine months' imprisonment with hard labour, to run from the date of his conviction.

Sentence reduced.

William Fisher.

WILLIAM FISHER.

On an indictment for obtaining by false pretences or other frauds, evidence of similar offences to that charged committed by the defendant is only admissible (*a* primâ facie *case being made*) *to negative a defence of mistake or accident, or to prove a systematic course of fraudulent conduct, but not to prove general bad character.*

This was an appeal against a conviction at Cheshire Quarter Sessions upon October 20th, 1909. There were three counts in the indictment alleging (a) an obtaining chattels by false pretences, (b) an obtaining credit by false pretences, (c) an obtaining credit by fraud other than false pretences. Prisoner was found guilty upon all three counts, and sentenced to three years' penal servitude.

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William Fisher.

Hugo Marshall for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Upon June 4th, 1909, appellant obtained a pony and trap from one George Strong of Wallasey, saying that he wanted them for his wife, whom he stated to be an invalid and therefore unable to select them herself. He took them away on June 4th on a week's trial, agreeing to pay £2 if he did not purchase them, and he gave Strong a promissory note for £25, which matured on the 14th June, as security for the value of the trap. Strong also stated that appellant said his bank (Parr's, at Widnes) would give him a good reference. It appeared that at the time of the transaction appellant had no account with Parr's Bank, and the note was not met upon presentment on the 14th. But previously, from January till June, 1908, appellant had an effective account at that bank in another name, and had Strong applied as to that name, the bank would not have replied that no such customer was known.

The following document written by Strong set out the above transaction :—

" To governess car, pony and harness, the sum of £25. Received by bill on the same date, G. Strong. Car can be returned within seven days upon payment of £2."

When the note was not met, Strong, two days afterwards, obtained a warrant for appellant's arrest.

In addition to this case the jury had improperly before them other instances of offences (not indicted) which the appellant was alleged to have committed. But only one of them was of a similar nature to the above transaction, viz., that of obtaining a horse at Great Grimsby by means of a worthless promissory note. The other alleged offences were of an entirely different character, viz., of obtaining fodder and provender on credit—it was assumed, fraudulently.

The transaction at Great Grimsby was stated to have taken place upon June 1st, 1909, and it broke down as the witnesses for the prosecution were unable to identify the appellant. The only other cases, in May and July, did not bear any resemblance to the circumstances of the case before the Court, and the facts did not disclose any crime at all. With regard to the two cases in July, where credit was said to have been obtained by the appellant by fraud, the facts were entirely different.

On the 3rd of July he was acting as a commission agent and obtained for his horses provender to the value of £1 8*s*. upon credit

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William Fisher.

at Blackburn, when he frankly stated that he had no money upon him at the time to pay for the goods.

Again on July 6th about £2 worth of clover chop and oats for his horses was sent to him by a Blackburn hay and straw dealer upon credit.

Counsel submitted that these cases were improperly used as evidence against the appellant. Evidence of other offences to be admissible must shew a similarity with that indicted; here it could not be similar to all those in the three counts, for they, though founded on the same facts, were dissimilar. He relied on *Rhodes*, (1899) 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; 19 Cox C. C. 182; C. C. R., and *Wyatt*, (1904) 1 K. B. 188; 73 L. J. K. B. 15; 52 W. R. 285; 68 J. P. 31; 20 T. L. R. 68; 20 Cox C. C. 462; C. C. R. In the latter case Lord Herschell's judgment in *Makin* v. *Att.-Gen. for New South Wales*, (1894) A. C. at p. 65, was quoted, viz., "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

To admit evidence of practice there must be something to create a nexus between the offences. There was no nexus between the offence charged and these other alleged offences, which were of an entirely different character. The case of *Makin* v. *Att.-Gen. for New South Wales* as explained in *Bond*, (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; 54 W. R. 586; C. C. R., shewed that evidence of a general fraudulent disposition was inadmissible.

A. J. Lawrie, for the Crown, submitted that if the evidence was admissible on any count in the indictment, it was admissible upon the whole indictment. It was quite clear from the evidence that there was a general practice of obtaining goods without the means or intention of paying for them, and if without any intention or any means of paying for these various lots of provender he obtained them, under assumed names, alleging that he was willing and able to pay for them, that would be material to the issue. A sufficient nexus with the offence charged was manifested in the state of the prisoner's mind, for, as Bowen L. J. said, "The state of a man's mind is as much a fact as the state of his digestion." (*Edgington* v. *Fitzmaurice* (1885), 29 Ch.D. at 483.) He referred the Court to the case of *William Jones,* (1898) 1 Q. B. at p. 122 ; 67 L. J. Q. B. 41 ; 77 L. T. 503 ; 46 W. R. 191 ; 19 Cox C. C. 87 ; C. C. R., where credit was obtained by fraud by a person who had no means or intention of paying for food he obtained at a restaurant. The evidence was admissible to shew the state of appellant's mind, and that he had neither means nor intention to pay. It was, therefore, within the principle of *Makin* v. *Att.-Gen. for New South Wales*, *Rhodes* and *Wyatt* (above).

CHANNELL J. : The appellant was charged on three counts, all practically relating to the same transaction. In substance, the obtaining of the pony and trap was a fraudulent transaction. The story that his wife was an invalid and could not inspect the pony and trap was false, and there appeared in other respects to be ample evidence upon which the jury could have convicted him without reference to these other cases, but these other cases were gone into and the jury may have been influenced by them.

The first of these cases would, in the opinion of the Court, have been admissible as evidence against the prisoner, but it had not been established, as there was a conflict of evidence upon the question of the identity of the party involved and the prisoner, and the jury found that that case had not been brought home to him.

The other instances were of a different nature. The principle to be observed in such cases is this :—Evidence of a prisoner's bad character is not admissible to prove that he is likely to commit the offence as to which he is charged. But to negative mistake or accident, or to prove a systematic course of conduct, other evidence may be admitted where the evidence before the Court goes to prove that he did commit the offence with which he is charged.

In this case we think such evidence was improperly admitted. It did not shew that the statements appellant made when he obtained the pony and cart were false, but it only amounted to this, that prisoner was a general swindler, and, as such, likely to have defrauded the prosecutor. The Court does not agree that

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the rule is different in a charge of swindling from that in other charges. The conviction must, therefore, be quashed, as the evidence admitted may have influenced the jury.

Conviction quashed.

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2 & 3 *December.*
Maurice (or Morris) Cohen.

MAURICE (OR MORRIS) COHEN.

Proviso to sect. 4 *of the Criminal Appeal Act*, 1907.
Amendment of indictment wrongly made, but "no substantial miscarriage of justice."

Appellant was tried at the Liverpool Quarter Sessions on 21st October and 1st November, 1909, and convicted of obtaining money by false pretences, and sentenced to nine months' imprisonment with hard labour. The jury recommended him to mercy on account of his youth. He appealed against conviction on points of law.

J. Lort Williams for the appellant, who was present.

(1) The indictment was bad because it alleged in each count two false pretences, (a) that a certain mineral, to wit, a jargoon, was a diamond, (b) that the said jargoon and a gold chain and locket were together worth 8*l*. The latter was not a false pretence in law, but a mere matter of opinion. (See *Bryan*, Dears. & B. 265; 26 L. J. M. C. 34; 3 Jur. N. S. 620; 7 Cox C. C. 312 (1857); *Levine*, 10 Cox C. C. 374 (1867); *Goss*, Bell C. C. 208; 29 L. J. M. C. 86; 8 Cox C. C. 262; 6 Jur. N. S. 178; 1 L. T. 337 (1860); *Ardley*, L. R. 1 C. C. 101; 12 Cox C. C. 23; 40 L. J. M. C. 85; 24 L. T. 193; 19 W. R. 478 (1871).) Therefore, according to *Wickham*, 10 A. & E. 34; 2 P. & D. 333; 8 L. J. M. C. 87 (1839); Q. B.; and *Philpotts*, 1 C. & K. 112 (1843), if the jury had found a general verdict of guilty, the indictment would have been quashed.

The learned Recorder amended every one of the six counts of the indictment, each alleging distinct but similar offences, by striking out the alleged pretence that the said articles were worth a certain sum of money.

(2) It is submitted that the Recorder had no power to so amend,

because the matter struck out was a material averment in the indictment. The only power of the judge to amend is under 14 & 15 Vict. c. 100 (the Criminal Procedure Act, 1851), which gives power to alter immaterial statements of name, place, description, matter, &c., so as to prevent any variance between the indictment and the proof. Such an amendment was to alter the quality of the offence, which is not permissible, even though it may be more favourable to the prisoner. (*James*, 12 Cox C. C. 127 (1871); *Wright*, 2 F. & F. 320 (1880).)

Such amendment prejudiced the prisoner, who had instructed counsel with information directed more particularly to the second alleged false pretence.

(3) The prisoner was embarrassed in his defence by the Recorder allowing all six counts to be tried together. Though admissible in law, this is very harsh. (See *Castro*, L. R. 5 Q. B. D. at 510; 14 Cox C. C. 436, 546; 6 App. Cas. 229 (1830 and 1831); C. A. and H. L.; Hawkins J., in *King* (1897), 1 Q. B. 214, 66 L. J. Q. B. 87; 18 Cox C. C. 447; 61 J. P. 329; 75 L. T. 392; C. C. R.; *Fussell*, 6 St. Tr. N. S. 723; 3 Cox C. C. 291 (1848).)

(4) The learned Recorder was wrong in law in holding that the prisoner's action or conduct amounted to a representation that the jargoon was a diamond.

As to the appeal on the facts, appellant trades in gold lockets, chains, &c., set with jargoons, which are stones, next in brilliancy to a diamond, and are often cut and set as diamonds, and honestly sold as such in the shops. He sometimes sells them and sometimes pledges them. He went into a pawnbroker's shop, in which he had not been before, and put on the counter an 18-carat gold chain, and locket set with a jargoon, and said: "I want 8*l.* on this." The pawnbroker had a full opportunity of examining it, but he was deceived because of the *cut* and *setting* of the stone in 18-carat gold, and thought it was a diamond, and lent the 8*l.* The articles were actually worth 6*l.* 12*s.* 6*d.* The pawnbroker made out a special contract, and therein described the articles pawned as "diamond, locket and chain," and asked the appellant to sign it. He had the opportunity to read the description, but there was no evidence that he actually read it. The pawnbroker agreed that the contract was a formal matter, that he had agreed to lend the money before the contract was signed, that he was not induced by the contract, but was deceived by the cut and setting of the jargoon. Appellant gave wrong name and address, but this did not influence the pawnbroker.

It is submitted that—

(1) There was no evidence that appellant read the document. If he did not, there could be no false pretence, in signing it.

(2) If he did read it, this was not the false pretence which induced the pawnbroker to part with his money. It was the cut and setting of the jargoon which induced him

(3) There was no representation that the jargoon was a diamond —certainly no evidence of such words. But as to conduct, there was evidence that jargoons were often set in this manner. The article pawned was worth 6*l.* 12*s.* 6*d.* at break up price, with no allowance for trade profit. The pawnbroker exercised his judgment, and there was no obligation upon appellant to explain that it was a jargoon. The pawnbroker was an expert. It was a case of *caveat emptor.*

If this conviction stands, it goes farther than any case hitherto reported. Those which have gone farthest hitherto are—*Barnard*, 7 C. & P. 784 (1837), the cap and gown case; and *Stevens*, 1 Cox C. C. 83 (1844). It is submitted that the Courts ought not to extend these cases.

If appellant had come to the same pawnbroker several times with a locket inset with real diamonds, and finally with a locket with jargoon inset, and used identical words, that would have been a clear false pretence, and on all-fours with *Stevens.*

T. C. P. Gibbons, fór the Crown, was not called on.

The Lord Chief Justice: In our opinion the amendment ought not to have been made. But there was no miscarriage of justice, because he could have achieved the same end, either by directing the jury to find a special verdict, or by telling them to disregard altogether the false pretence as to value. There being no miscarriage of justice the proviso to sect. 4 of the Criminal Appeal Act comes into operation. If a prisoner chooses to go into the witness-box this Court will take his evidence into consideration, and, taking into consideration the fact that several answers of the appellant when giving evidence were very unsatis-

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factory, and that his giving false names and addresses was inconsistent with his assertion that he was honestly trading in these goods, it was clearly a case for the jury, and there was evidence upon which a jury could properly convict.

Appeal dismissed.

Solicitors for the Appellant: *Evelyn, Jones and Webb*, agents for *R. Barrow-Sicree*, Liverpool.

BENJAMIN SCHOLEY.

Benjamin
Scholey.

On a trial for murder the judge is entitled to tell the jury that there are no grounds for finding a verdict of manslaughter.

This was an appeal, on a point of law, against a conviction on November 22nd, 1909, at Liverpool Assizes, for the murder of Minnie Gascoigne on October 4th. Appellant was sentenced to death by Ridley J.

Appellant was an Army Reservist and had been acquainted with the young woman, Mrs. Gascoigne, in early years, and she had promised to marry him, when he went away to Ireland for two years, and when he returned about September, 1908, to Liverpool, he suddenly found she had married. He could not get regular work, and renewed his intimacy with her; she left her husband in June, 1909. On Friday, October 1st, appellant received his pension of 2*l.* 5*s.*, and began to spend a good deal of money on drink, and for the whole of the next three days, viz., Saturday, Sunday, and Monday, he was drinking, and most of the time in the company of the deceased woman. On October 2nd appellant asked her to go away with him to Ireland where he had got an engagement as groom; she, however, refused on account of the children, but promised to meet him later in the day. In the afternoon she went into Boyd's public-house with her landlady, but ran away when she saw appellant. Thereupon he pulled out of his pocket a case with a razor in it, and he said, "I will kill her when I get hold of her," but the razor was taken away from him. Subsequently he went off and spent the night with the deceased woman. On the Sunday,

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Benjamin Scholey.

October 3rd, they were seen drinking together throughout the day, and spent the night in the same house.

On Monday, October 4th, he was completely under the influence of drink, and again begged her to go to Ireland with him, and she alternately consented and refused. They then walked out together some distance towards Croxteth Park, and they sat down near a brook. He subsequently strangled her with his belt, and threw her body into the water. Afterwards he confessed the crime, gave himself up, and described the place where the body was to be found. He gave evidence on his own behalf, and then the learned judge permitted the Crown to call Dr. Price, the prison surgeon, to speak to the state of appellant's mind on October 4th from his subsequent observation of him in prison, though when the prosecution tendered this witness at the end of its case and appellant's counsel objected, the objection was sustained.

E. Wooll for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was not present. The appeal was based on two grounds. First, in the summing-up the jury had been misdirected, because the judge had not put to them an accurate statement of the law differentiating murder and manslaughter. Secondly, the prosecution had improperly called evidence which they were not entitled to call. There was considerable evidence before the jury that the three days' debauch had affected appellant's mind. All the witnesses for the Crown who saw him on the 11th spoke of him as "mad with drink." He (counsel) had submitted to the jury the possibility of one of three verdicts—viz., murder, manslaughter, or guilty, but temporarily insane—but the judge merely summed up the case to the jury with a view to their finding him either guilty of murder on the one hand, or temporarily insane on the other, and had practically excluded the third alternative of manslaughter from them. He had inaccurately defined and distinguished murder and manslaughter in his summing-up. The judge said:—

"It is admitted that his was the hand that caused the death of Minnie Gascoigne. Therefore that question is not before you."

And later on in describing what happened on October 4th:

"They walked out together, quietly, some distance, and according to the evidence of some of the witnesses, not in the manner of staggering drunk or anything of that kind . . . to the neighbourhood of Croxteth Park, and having passed along the road, which is shewn on the map before you, they finally got to the bridge and then there was some tussle between them. It was regarded not as a very serious matter, but as a friendly one by the witness who was called before us. She was got back through the fence after he had gone through, and they sat upon the grass, and finally with the belt which he wore he strangled her and left her body in the water. That belt held tightly round the neck of the woman produced suffocation in about three and a half minutes. It seems to me that it is very difficult for any jury to say that such a thing is manslaughter. It is not a case in which a violent blow was inflicted, or some unlawful blow inflicted without any intent to take life. It was not by drowning that her life was taken. It was by the three to three and a half minutes that that man held this belt round this woman's neck. I think that no jury ought to say that that sort of violence should ever be described as manslaughter. It is murder if it is anything. . . . The learned counsel said that he being in drink this might be manslaughter, or that a case in which a person had been in drink and had committed a crime which would otherwise be murder might in such circumstances be manslaughter only. Where, for instance, there had been provocation, or a fight, the law has allowed in such cases that the inference may be drawn that the accused has not had that deliberate intent which is necessary to constitute the crime of murder, but has acted as the result of heated action which passion and excitement of that kind may produce. There is no one who can say, as it seems to me, that this is such a case. It is true he had had drink; it is true that he had drunk heavily. Where is the excitement, where is the provocation, where are the circumstances which we have allowed to influence the Courts in reducing the crime to manslaughter? I am bound to say I see no manslaughter in this case. I am not able to do it. I see no ground, gentlemen, upon which you could find a verdict of manslaughter in this case." No doubt the learned judge was entitled to give the jury his own view, but it was his duty to give them an accurate differentiation between murder and manslaughter *in cases of drunkenness.*

The proper test in such case had always been whether a prisoner was so drunk that he did not know what he was doing, or did not know what he was doing was dangerous. The Court had quite recently laid down the proper direction in *Meade's* case, (1909) 1 K. B. 895; 78 L. J. K. B. 476; 2 Cr. App. R. 54; 25 T. L. R. 389; W. N. 62; 73 J. P. 239. That decision expressly approved the judgments in *Monkhouse*, 14 J. P. 115; 4 Cox C. C. 55 (1849), and *Doherty*, 16 Cox C. C. 306 (1887). There was a misdirection on the question of provocation. There were two questions for the jury to consider as raised by the defence, viz., either the man was insane, or he was so drunk that he did not appreciate the consequences of his action—he did not know that what he was doing was dangerous. The learned judge admitted that there was evidence of temporary insanity; *à fortiori* there must have been some evidence on which a jury could have found manslaughter.

[Lord Coleridge J.: This was a deliberate act. He knew he had killed her by strangulation. He told the officer to lock him up for murder.]

The jury believed, after the summing-up, that unless provocation was shewn, they could not find him guilty of manslaughter. That direction was wrong. The question as to his degree of drunkenness should have been left to them, whether he was not too drunk to appreciate the full danger of what he was doing, as in the case of a drunken man overlaying a child.

He also submitted that the evidence of Dr. Price as an expert witness was improperly admitted to rebut the general defence of insanity. It was successfully objected to at an earlier stage, as he had not been called before the magistrates, and it was only fair that the defence should have had a copy of his report, which might have enabled them to consider the advisability of calling a doctor.

No new case not set up at the police court had been set up at the trial, and the Crown was not entitled to call rebutting evidence.

F. T. Bigham, for the Crown: The prosecution only had a copy of Dr. Price's report on the morning of the trial, and it was handed to the defence at once.

The Lord Chief Justice: This poor woman was strangled by a belt tied or held round her neck till she was dead. It was not a case of a belt tied by a drunken man. He knew perfectly well

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what he had done, and how he had murdered the woman, and in such a case it would be impossible for a judge to allow a jury to find a verdict of manslaughter, for deliberate acts, whether done by a sober or a drunken man, constitute the crime of murder, and not of manslaughter. There is no analogy between this case and the case suggested by counsel of a drunken man overlaying a little child. The judge quite rightly said this was a case of murder, and the fact that he may not have sufficiently stated the distinction between murder and manslaughter is unimportant, for it has no bearing upon the point; and, as this Court has often said, when a judge sums up he is not composing a law treatise, but speaking with regard to the facts of the particular case. No judge can affect to give an exhaustive exposition of the law; all he can do is to direct the jury properly, and in this case we are of opinion that there is no ground for saying that the jury were misdirected. The second point raised is that the prosecution were not justified in calling Dr. Price. The circumstances of the case shewed that by cross-examination the defence was going to set up that appellant was not responsible for his actions. Thereupon the prosecution appreciated that they had to give evidence on the point to answer the cross-examination. If there was any evidence before the jury that the prisoner was insane at the time, it was clearly the duty of the prosecution to call rebutting evidence. If there was no evidence of insanity before the jury, then calling medical evidence would not have affected the case. In our opinion there is no ground for interfering with the verdict.

Appeal dismissed.

JAMES DONOGHUE.

James
Donoghue.

Misdirection alleged by the use of a particular expression.

This was an appeal by leave of Hamilton J., against conviction on November 4th at Cardiff Assizes of unlawfully wounding one Samuel Snow. Prisoner, who had been in prison since July 11th, was sentenced by Lord Coleridge to five months' imprisonment with hard labour.

The prosecutor, a lodging-house keeper, had ordered the

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prisoner, on July 11th, to leave his house, whereupon appellant took up a knife and stabbed him in the head.

Lovat Fraser, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The only evidence called by the prosecution with regard to the actual infliction of the injury was that of the prosecutor himself. For the defence, it was said that the prisoner knew nothing about the infliction of the injury.

Four witnesses who were called for the defence said that the appellant was asleep at the time, and two of the witnesses said the injury was inflicted by a fall over a bench. As the jury found him guilty, they must have done so owing to the summing-up. It was submitted that the judge had misdirected the jury in the following passage, which seemed to suggest that the prisoner must prove whe stabbed the man, if he was stabbed at all. " Somebody must have wounded him. Who was the man ? If it was not the prisoner, who was it ? You have got first of all the evidence of the prosecutor, who admits that he had had some drink. Sometimes a wound of this kind sobers a man if it does not make him dazed. He says about half-past one in the morning he told the prisoner to leave his lodging-house. The prisoner refused and called him names, seized the knife, and cut him in the way described, and he fled out and went at once to the police officer. If you doubt that, who did it ? Somebody must have done it. I do not understand anybody suggests that it was self-inflicted by the prosecutor. Can they suggest or give any explanation to you if it was not the prisoner, who it was ? It is not really seriously suggested that the Dutchman, who seems to have spoken excellent English, did it. These people must know—Byrne and Barry must know who did it. Are they shielding someone else ? The prosecution says it was the prisoner. Barry says it was the prosecutor himself, but that is ridiculed by the doctor." It is submitted that this passage must have caused the jury to infer that appellant was guilty of stabbing Snow because he had not proved who else had done so.

The doctor had not ridiculed the suggestion. His answer to the question in cross-examination whether a drunken man falling upon the edge of a bench might not have inflicted the wound upon himself, was, " I do not think so, unless he butted up his head." It is submitted that to say the doctor " ridiculed " the suggestion was a misdirection.

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The prosecutor, according to the evidence of the police officer, was the worse for drink, and it is also submitted that this fact was not brought before the jury with sufficient force in the above summing-up. In this case the wound had not sobered the prosecutor at all, and his evidence ought, therefore, to have been regarded with the greater caution.

Ivor Bowen, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: We do not sit here to criticise the use of particular words, or of a particular expression, and it is going very far indeed to say that there has been misdirection when the jury are told that the doctor thinks it "ridiculous" to regard a wound—clean cut as with a knife—as being self-inflicted, when the doctor himself says, "I do not think it possible that it could have happened in that way unless he butted up his head." If the word "ridiculous" in the summing up was not correct, we feel quite satisfied that the jury, after hearing all they did about the case, would not attach importance to it. As for the prosecutor being drunk, the summing-up of the judge appears to us to be quite correct. "The blow may have sobered him" are the words used, and why that observation is inaccurate, much less a misdirection, we are unable to see.

In our opinion there is not the slightest ground for appeal.

Appeal dismissed.

GEORGE RAY AND JAMES CARTER.

George Ray and James Carter.

Severity of sentence.

This was an appeal by leave of Hamilton J., against a sentence of eighteen months' imprisonment with hard labour for stealing a quart of milk, imposed by the Chairman at the County of London Sessions on November 16th. Legal aid had been refused to the two prisoners, who appealed in person against this sentence, and also against their conviction.

Both prisoners made a statement declaring their innocence, saying that they were having breakfast at the time the milk was stolen, about half a mile away, at a Lockhart's coffee shop.

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A. J. Lawrie, for the Crown. This was the defence appellants raised at the trial, when it was proved that their evidence did not amount to an *alibi*, and that it was quite possible for them to have been in Lockhart's that morning at the time they alleged and yet to have subsequently drunk the milk. The facts in both cases were the same. Two police officers in plain clothes observed at 5 a.m. that their actions were suspicious. At about 6 a.m. they were again seen by the officers in the Charing Cross Road. One of them went to the corner of the road to watch, while the other went and drank some milk out of a can left in a doorway of one of the houses ; then the other had a drink while the former watched. They were arrested on the spot. The prisoners said in Court that they left Lockhart's near Covent Garden at five minutes to six, and that Lockhart's is only five minutes walk from where they were drinking the milk.

There were several previous convictions against Ray at intervals between 1898 and 1908—six in all. There was a prolonged interval between the last two, viz., from 1903 to 1908, because in 1903 he was sentenced to three years' penal servitude and two years' police supervision for larceny. Against Carter there were also several previous convictions, the last one in 1908 being for burglary, when he was sentenced to eighteen months' imprisonment with hard labour.

They were both liberated from the same prison within a day of each other, and that pointed to the fact that their meeting was not accidental as they suggested.

The LORD CHIEF JUSTICE : Their account that they were in Lockhart's is quite consistent with the story of the prosecution. In our opinion they were properly convicted, but with regard to their sentence we think that eighteen months' imprisonment is out of all proportion to the nature of their offence, although both have bad records and can never expect such lenient sentences if they are convicted again.

The sentence will therefore be reduced in each case to three months' imprisonment with hard labour, to run from the date of conviction.

Sentences reduced.

CHRISTOPHER WALLS AND LAWRENCE DAVIES.

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Christopher Walls and Lawrence Davies.

Severity of sentence.

This was an appeal by leave of Hamilton J., against a sentence at Liverpool Assizes, on November 29th, of five years' penal servitude for burglary and housebreaking. Both prisoners had pleaded guilty before Ridley J. upon November 18th of breaking into No. 91, Carisbrooke Road, Liverpool, and were then sentenced to seven years' penal servitude. They applied for leave to appeal against the sentences. The sentence was reduced by the learned judge to five years' penal servitude upon the grounds that the two prisoners were only twenty-two years of age, and that though they had both been convicted for numerous burglaries on previous occasions, yet these burglaries were trivial ones

W. H. Aggs, for the appellants (under sect. 10 of the Criminal Appeal Act), who were not present. At the Assizes it appeared that Lawrence Davies was then serving a sentence of twelve months' imprisonment, and Christopher Walls a sentence of fifteen months' passed at Birkenhead Quarter Sessions in August. The learned judge said in the first instance, "Lawrence Davies and Christopher Walls, it appears that besides the twenty-four offences for which you were sentenced at the Quarter Sessions at Birkenhead the other day, there are twenty-four more with which you are known to have been concerned. It is quite impossible to regard a sentence of twelve months' and fifteen months' imprisonment which you respectively received as anything like sufficient. In a case of this wholesale practice carried on by you, there is no sentence which can be sufficient, short of seven years' penal servitude."

This sentence was subsequently reduced by him to five years' penal servitude on the grounds of their youth, and the fact that the burglaries for which they had been previously convicted were of a trivial character.

But the learned judge took into consideration on both occasions numerous other alleged cases which the prisoners had no oppor-

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tunity of admitting or denying, and referred to the prisoners having made untrue statements, though in fact they had made no statements at all except in their written appeals to this Court. The learned judge said, in reducing the sentences : " I have had further inquiries made. . . It is not true that they [appellants] are not guilty of the other burglaries alleged against them and which were sufficiently brought home to them." The sentence of five years' penal servitude was based on erroneous considerations and was, in the circumstances, too severe.

A. J. Lawrie, for the Crown, was not called upon.

Appeal dismissed.

Albert Asquith Jackson.

ALBERT ASQUITH JACKSON (*a*).

Common law misdemeanour—Selling, publishing and uttering obscene prints—Power to award hard labour in the case of any public selling or exposing for public sale or to public view—14 & 15 *Vict.* c. 100 (*Criminal Procedure Act*, 1851), *s.* 29—*What is a public sale within the meaning of this section.*

Semble, *that the sale of obscene prints by sending them through the post in reply to an order transmitted in a letter is not a "public" sale within the statute, and "publishing" may be effected by a private as well as by a public, sale. Severity of sentence.*

F. W. Sherwood for the appellant, who was not present. The indictment consists of four counts: the first alleges that the defendant on the 9th day of June " unlawfully, wickedly, maliciously and scandalously did sell, utter and publish to one William Hughes, certain lewd, wicked, scandalous and obscene prints, to wit, seventeen photographic prints," which it proceeds to describe. The second alleges that he unlawfully obtained the prints with intent to utter, publish, sell and disseminate them. The third and fourth counts repeat the first and second counts, so far as the nature of the offences is concerned, but allege the offences in

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(*a*) See p. 166, above.

respect of one of the seventeen prints which is described in these two counts with greater particularity. It is manifest from the depositions that all four counts deal with one and the same event and one and the same subject-matter. In effect, there is only one offence. I submit that this is a mere common law misdemeanour; all the counts conclude "against the peace" only, without the addition "against the statute," which would have been the right form if a public sale under 14 & 15 Vict. c. 100, s. 29 (The Criminal Procedure Act, 1851), had been intended to be charged. The law is to be found in *Archbold*, 23rd ed. at pp. 238 and 1193. The section in question gives power to add hard labour where there has been "any public selling or exposing for public sale or to public view of any obscene book, print, picture or other indecent exhibition." No such sale is alleged here in the indictment. It ought so to have been if the prosecution intended to charge it. The use of the words "publish and sell" in the indictment do not necessarily import a *public* selling. There may be a private publishing by means of a private sale. There are cases and authorities shewing the distinction. Even if the charge were well laid in the indictment, the facts alleged in the depositions would not support it. Here the defendant, a stationer and bookseller of Burton-on-Trent, sent through the post, in answer to an order received by him in a letter, a parcel of obscene prints. That is *primâ facie* a private sale, a private publishing, to the recipient; and there is no circumstance taking it out of that category.

[The Lord Chief Justice: We think that you are right as to that point.]

H. G. Farrant, for the Crown, in answer to the Court, was prepared to argue that there was a public sale on the facts.

[The Lord Chief Justice: But, if so, is the offence so laid in the indictment?]

I admit that it is not. I cannot so contend.

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[The Lord Chief Justice: Then the punishment of hard labour cannot stand.]

Sherwood: Still, if my learned friend contends that there was in fact a public selling, I should like to argue the point, because your Lordships might be affected by that suggestion, on the general question of the reduction of the sentence, which, even with the taking off of the hard labour, is, I submit, too severe.

Counsel then asked leave to argue upon the general question.

[The Lord Chief Justice: I am not sure that it is open to you. We should not have extended your client's time to appeal had it not been for the point of law. Why was he out of time?]

Sherwood: He and his friends bethought themselves first of a petition signed by his fellow-townsmen, to the Home Secretary. When I was consulted just before the time to appeal elapsed, I advised that the best course was to come to this Court first. Besides, your Lordships expressly gave me an extension of time to appeal generally.

I contend that the sentence is too severe. There were many circumstances of mitigation; the defendant was a respectable tradesman, of good character, carrying on a genuine business of a quite proper kind, which he was not using as a cloak for the surreptitious dissemination of obscene things. He was not selling such things in or through his business, or in any way trying to dispose of them to his customers or frequenters of his shop or at all in the town. He sold one packet through the post in response to an order. No others were found in his shop; he did not keep them in stock. There was no evidence that he had ever sold any, or shewn any, to young people. It was, in fact, a first and only offence. One circumstance which was put forward in mitigation was that he had never seen these articles.

[The Lord Chief Justice: Then why did he plead guilty?]

Because he had to admit that he knew that they were obscene; though he had not opened the parcel, which had been sent from Germany, still he knew their nature, though not necessarily how bad they were. All these matters, and more, were stated by me in addressing the Court, but my complaint is that, though they were clearly proper subjects for consideration, the Court did not take them into account. I shew that to have been the case in this way. The Chairman of Quarter Sessions at Stafford takes the greatest care in awarding punishment, and proceeds to sentence only after grave and slow deliberation. My speech was listened to, but I must assume that the Court cannot have taken these circumstances of mitigation into consideration. The Chairman would most certainly not have taken them into consideration without asking if they were true. He would have put it to the learned counsel for the prosecution or to the police witnesses, whether these things were admitted. The defendant having pleaded *guilty*, and therefore not having the right to testify to these things on oath, was placed at a disadvantage He could not make the allegations himself. The prosecution did not admit them, and the Court did not inform itself whether they were true or not. The Chairman simply asked my learned friend if the prints were "gross," and my friend said, "They speak for themselves." That was tantamount to saying they were gross. Now I contend that the Court, not having ascertained if these pleas in behalf of mitigation were true, must be taken to have ignored them; yet clearly they were pertinent, and important, and ought to have affected the sentence. I attribute the course the Court took to the fact that this was a most unusual offence to be found in the calendar at Stafford, and that the magistrates naturally regarding it with great detestation, were led insensibly into the fallacy of treating the offence as if there could be no degrees in it. They looked at the class of offence, not at the actual instance of it. Notwithstanding the abhorrence properly felt of such prints, each case must be treated on its individual merits. I complain that the Court did not condescend to particulars. Their treatment of the case was as if they had said that in this class of crime nobody could be treated as a first offender, nobody could avail himself of good character or mitigating circumstances.

[The Lord Chief Justice: We have heard that the Court inquired if the prints were "gross," and we know as a fact that they were very gross.]

The use of the word "gross" tells us nothing; all "obscene" things are, and must be, "gross." "Obscene" itself implies something "gross" and even worse than much else that is gross. And this was the only inquiry the Court made before passing sentence. My client's pleas stood unanswered, but did not avail him, and he had no power of proving them. I ask the Court (which is now in as good a position to judge of the case as the court below) to give effect to those pleas. In the London courts of criminal justice, where such offences are more familiar, even far worse cases (*e.g.*, when blasphemy and profanity are intermixed with the obscenity, which is not the case here) have often been visited with a fine, or, at all events, a much less sentence.

The LORD CHIEF JUSTICE: Upon the legal point raised in this case, the appellant must succeed. There was no power to give hard labour upon this indictment, for the reasons which have been given, and there is no need to repeat them. The learned counsel for the prosecution suggested that the facts disclosed in the depositions might amount to a public selling; but in the view which we take, we do not think, upon the whole, that, as we understand them, they constitute a public sale. So that the part of the sentence which awarded hard labour must be quashed, and so far the appeal must be allowed. With regard to the question of severity, we are not prepared to admit that six months' imprisonment is excessive. This is a very serious class of offence, and the traffic in obscene prints may have deplorable and far-reaching consequences, as tending to the depravation of young minds and corrupting people's morals. It is said that such offences are rarely the subject of indictment at Stafford. Staffordshire is perhaps more fortunate than other counties; the offence is hard to detect. This Court cannot say that the sentence is severe. The sentence, therefore, must be affirmed as to its duration, but without the hard labour.

Sentence, so far as regards hard labour, quashed.

Solicitors for the Appellant: *R. W. Skinner*, Burton-on-Trent.

WILLIAM RICHARD WELLS.

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Whether a sentence is too severe or not may depend on the question whether other pending charges have been taken into account in it or not.

This was an appeal, by leave of Hamilton J., against sentence of eighteen months' imprisonment with hard labour imposed by Lawrance J. at Hertford Assizes on November 6th, 1909, for larceny. At the trial prisoner pleaded guilty to an indictment charging him with stealing certain articles of jewellery in August and October, 1909. He had been previously convicted of felony at Bacup, Lancashire, in February, 1907.

Stanley R. Crawford, for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Leave to appeal against sentence had been granted apparently because it did not appear quite clear how far other complaints and charges against the appellant had affected the sentence. There were numerous complaints alleged against the appellant before the previous conviction which the appellant stated had been taken into account on that occasion. In many cases the injured parties refused to prosecute. In *E. A. G. Wells*, 2 Cr. App. R. 259 ; 73 J. P. 415 (1909), it was held that sentence should not be affected by a charge in a withdrawn indictment, and this is submitted *à fortiori* with regard to complaints in which the complainants refused to prosecute.

J. Harvey Murphy, for the Crown. The cases before 1907 were not taken into account at the trial. He referred the Court to *Markham*, 2 Cr. App. R. 160 (1909). All pending charges against a defendant should be mentioned to the Court with the view to a comprehensive sentence. There were also cases of prisoners who were guilty of a series of offences in different jurisdictions. *Syres*, 73 J. P. 13; 25 T. L. R. 71; 1 Cr. App. R. 172 (1908). If prisoner behaves himself he will be in no danger. The doctrine of the " clean slate " will apply

Crawford, in reply. Then the object of the appeal was achieved. It was not suggested that the sentence was excessive if the Court would express an opinion that it covered all outstanding

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charges. As the appeal was the result of a genuine confusion with regard to what the sentence covered, he asked the Court that sentence might run from the date of conviction.

The Lord Chief Justice: It is very properly admitted on behalf of the appellant that the sentence was not excessive. But it is our opinion that the sentence of eighteen months' imprisonment should cover all the other charges mentioned, and that no further prosecution in respect of offences before his trial should be brought. The sentence would run from the date of conviction.

Appeal dismissed.

William Ross.

WILLIAM ROSS.

Severity of sentence.

This was an appeal, by leave of Hamilton J., against sentence imposed on November 16th by the Recorder of London, at the Central Criminal Court, of twenty months' imprisonment with hard labour for breaking and entering a shop of the Aerated Bread Company and stealing therefrom a pipe and other articles to the value of fourteen shillings.

The appellant and one James Smith broke through the window of the shop about a quarter to one in the early morning, and took therefrom the articles referred to. They subsequently ran away, but were caught by a police officer who pursued them. At the trial both prisoners pleaded guilty. Three previous convictions were proved against the prisoner Ross, viz., (1) on June 25th, 1908, for larceny of a satchel, for which he was sentenced to twenty-one days' hard labour; (2) on May 21st, 1909, for loitering, for which he was sentenced to fourteen days' hard labour; (3) on July 19th, 1909, for loitering, for which he was sentenced to three months' hard labour. In addition to the evidence of these convictions, the sergeant in charge of the case was called and stated that when he asked the prisoners for information and offered to make inquiries on their behalf they refused to give him any information.

The Recorder, in passing sentence of twelve months' hard labour

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on Smith, and twenty months' hard labour on Ross, referred to the fact that Ross had been repeatedly convicted on charges of larceny and as a rogue and vagabond, and also that he had refused to give any information about himself.

Appellant was not present, but his written statement was read by the Court. In it he urged that he had been out of work owing to slackness of trade, that his longest previous term of imprisonment was three months, and that it was for a very minor offence.

H. R. D. May, for the Crown. The appellant's statement does not meet the facts on which the Recorder relied in passing sentence.

The LORD CHIEF JUSTICE: In this case we have experienced considerable difficulty. The Recorder imposed a long term of imprisonment upon the prisoner, believing that a short sentence would do no good; and while it is true that only three previous convictions were proved against the appellant, on the other hand, he refused to give any information about himself.

We only interfere with sentences, as a general rule, when it appears that the sentence has proceeded upon some wrong principle.

After careful consideration we think that the sentence of eighteen months' imprisonment with hard labour is too severe, and we think that it must be reduced to twelve months.

Sentence reduced.

WILLIAM GARLAND (SEN.) AND WILLIAM GARLAND (JUN.).

William Garland (Senior) and William Garland (Junior).

The provisions of 14 & 15 *Vict.* c. 100 (*The Criminal Procedure Act*, 1851), s. 12, *apply to an indictment charging as a misdemeanour the unlawful receiving of goods with knowledge that they were feloniously stolen.*

CASE STATED.—"At the Michaelmas Quarter Sessions for the county of Somerset held at the city of Wells on Wednesday, the 27th day of October, 1909, William Garland the elder and William Garland the younger were put upon their trial in the second Court upon the following indictment, at the head of which appeared the word 'Misdemeanour.'

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William Garland (Senior) and William Garland (Junior).

Somerset, to wit. } The Jurors for Our Lord the King upon their Oath present, that William Garland, senior, and William Garland, junior, between the first day of October in the year of Our Lord one thousand nine hundred and eight and the seventeenth day of July in the year of Our Lord one thousand nine hundred and nine one patch box, a revolver and fittings in a wooden case, one and a half yards of green velvet brocade, four brass bed knobs, and a quantity of wire nails of the goods and chattels of Samuel Lawrence unlawfully did receive and have, they the said William Garland, senior, and William Garland, junior, at the time when they so received the said goods and chattels as aforesaid then well knowing the same goods and chattels to have been feloniously stolen, taken and carried away against the form of the statute in such case made and provided and against the peace of our said Lord the King his crown and dignity.

2. Before the prisoners pleaded to the indictment, their counsel Mr. E. H. C. Wethered, moved the Court to quash the indictment on the ground of the omission of the words 'and feloniously' after the word 'unlawfully' in the indictment. He also contended that the grand jury had not returned a true bill for felony.

3. After comparing the indictment with sect. 91 of the Larceny Act, 1861, and after consulting the Chairman of Quarter Sessions in the first Court the Deputy-Chairman and justices in the second Court ruled against the contention of the prisoners' counsel, being of opinion (1) that the indictment sufficiently followed the words of the statute, (2) that the felonious intent sufficiently appeared on the face of the indictment, and (3) that the heading of the indictment was not portion thereof, and should be disregarded.

4. The prisoners thereupon pleaded not guilty to the indictment. They were given their right of challenge and were given in charge to the jury, and the trial proceeded as in cases of felony.

5. The jury found both prisoners guilty on the indictment, and Mr. Wethered thereupon moved in arrest of judgment.

The Deputy-Chairman offered to state a case for the consideration of the Court of Criminal Appeal, and counsel for the defence accepted the offer. Sentence was thereupon deferred, and the prisoners were informed that they would be released on bail pending the decision of the Court of Criminal Appeal.

6. The question for the opinion of the Court is whether the conviction is good, and whether the Court of Quarter Sessions should now proceed to sentence the prisoners or whether the conviction is bad and should be quashed."

Charles Stimson, for the appellants, who were on bail. Appellants were father and son. The father carried on business in Wilton Street, Taunton, where he had a small shop, and the son assisted the father in the business. The latter also let out bicycles on hire, and the father assisted several auctioneers in the town in connection with their furniture sales for several years. They were indicted for felony, but nowhere in the indictment was the word "felonious" used as contemplated by the statute (24 & 25 Vict. c. 96, s. 91). An objection at the trial was at once taken, but it was overruled.

The word "feloniously" must be introduced into every indictment for felony, whether it be a felony at common law or by statute—"feloniously" being a term of art for which no equivalent expression can be substituted, as was held in *Gray*, Leigh & Cave, C. C. 365; 33 L. J. M. C. 78; 10 Jur. N. S. 160; 9 L. T. 733; 12 W. R. 350; 9 Cox C. C. 417 (1864).

The form of the indictment did not follow the precedents given by Archbold, or Saunders, and by the omission of the word "felonious" it was bad in law.

S. C. N. Goodman, for the Crown. It would be difficult to support the indictment as one for felony, but that difficulty could be surmounted by treating the indictment as one for a misdemeanour at common law. Receiving stolen goods is still a separate and distinct offence, and a common law misdemeanour, although certain statutes have rendered the receiver liable to be prosecuted as an accessory and for a substantive felony: but the common law misdemeanour has not been thereby merged in the statutory felony save in so far as it might operate to the prejudice of a prisoner in his running the risk of being tried a second time for the same offence. It exists side by side with the statutory felony.

Receiving was not *created* a felony under the Larceny Act of 1861; for by sect. 4 of 3 & 4 Wm. & Mary, c. 9 (in 1691; repealed) a receiver might be taken and deemed an accessory to the felony after the fact.

Cross, Ld. Raym 711; 3 Salk. 193 (1702), was decided on the ground that at that time an acquittal on the common law misdemeanour formed no bar to an indictment for the felony. After that case the statutes 1 Anne, st. 2, c. 9 (by repealed s. 2) (1702), and 5 Anne, c. 31, ss. 5, 6 (1706; repealed), were passed, enacting that the receiver might be prosecuted and punished as for a misdemeanour, although the thief were not before convicted or could not be taken so as to be prosecuted. And so in *Pollard and Taylor*, Ld. Raym. 1370 (1724), it was held that the receiver could be prosecuted either for felony or misdemeanour, but that he should not be liable to be prosecuted twice for the same offence. *Cross* could not be held to be good law to-day. In *Payne* (1906), 1 K. B. 97; 75 L. J. K. B. 114; 94 L. T. 288; 54 W. R. 200; 70 J. P. 28; 21 Cox C. C. 121; 22 T. L. R. 126; C. C. R., that case was not necessary to the decision, and the observations by Lord Alverstone, L. C. J., relating to that case, were *obiter dicta* only. Again, *Smith* (1870), L. R. 1 C. C. R. 266; 39 L. J. M. C. 112; 22 L. T. 554; 18 W. R. 932; 11 Cox C. C. 511, and *Streeter*, (1900) 2 Q. B. 601; 69 L. J. Q. B. 915; 83 L. T. 288; 48 W. R. 702; 64 J. P. 537; 19 Cox C. C. 570, both shew that receiving goods with knowledge that they have been stolen can still be a common law misdemeanour.

Sect. 12 of the Criminal Procedure Act, 1851, enacts that if upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour.

And sect. 33 of the Interpretation Act, 1889, provides that where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall (unless the contrary intention appears) be liable to be punished under either or any of those Acts, or at common law, but shall not be liable to be punished twice for the same offence.

Counsel also quoted 1 Russell on Crimes (1909 ed.), at p. 6, as to the effect of sect. 33, and at p. 13 as to *Payne*. He also referred to Foster's Crown Law, p. 373, and to *Carlile*, 3 B. & Ald. 151 (1819), and *Gregory*, L. R. 1 C. C. 77; 36 L. J. M. C. 60; 10 Cox C. C. 459 (1867).

The indictment contained the words:—"against the form of the statute," but by sect. 24 of the Criminal Procedure Act of 1851 those words can be regarded as mere surplusage.

Stimson, in reply: The misdemeanour would be merged in the felony by sect. 91. Either the offence charged against the appellants was a felony—and then the indictment was clearly bad—or it was no offence at all, the words of the indictment being "unlawfully did receive and have."

CHANNELL J.: In this case the question for the Court to decide is whether the appellants, who have been convicted quite properly upon the merits of the case, shall be entitled to the benefit of a technical point a slip in the form of the indictment. We think that a sentence of hard labour cannot be imposed, as the indictment does not contain the words "and feloniously." That makes it clearly bad as an indictment for felony and, if good at all, it is only good as an indictment for misdemeanour at common law, for which hard labour cannot be imposed. The allegation "against the form of the statute, &c." is surplusage, and in other respects the indictment is the same as the case of *Payne* (above). That was a case where an indictment was held to be good which charged as a misdemeanour the receipt by a person of money stolen by a wife from her husband, knowing the money to have been stolen. It did not amount to a felony either at common law or by the Larceny Act of 1861, but was made a criminal offence by the Married Women's Property Act, 1882. It was not a felony within sect. 91 of the Larceny Act, or under any other statute. Accordingly the conviction was held good as a common law misdemeanour. That was a case of a married woman, and on the facts is very different from the present case. It is, however, an express authority that in form this indictment is good, and the question becomes one of proof only—on the facts of this case being proved, it became evident that the offence really committed was a felony. In our opinion this case comes exactly within the words of sect. 12 of 14 & 15 Vict. c. 100, viz.:—"If upon the trial of any person for any misdemeanour, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour." And we think that this is a good conviction for

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William Garland (Senior) and William Garland (Junior).

misdemeanour. The test of what a man is tried for is the indictment, which in this case is expressly for misdemeanour.

It is not necessary for us to deal with other cases, outside the Larceny Act of 1861, which have been suggested by Mr. Goodman, or with sect. 33 of the Interpretation Act.

We are of opinion that the conviction is good as a conviction for a misdemeanour, and must be upheld; but we also think that the sentence cannot include hard labour. Our decision is, of course, technical, but it is an answer to a mere technical objection founded on an accidental slip—of which appellants get the benefit to the extent of getting off hard labour.

Appeal dismissed.

Solicitors for the Appellant: *Sweet & Son,* Taunton

Solicitor for the Respondent: *C. P. Clarke,* Taunton.

Francis Wint.

FRANCIS WINT.

Severity of sentence.

Leave to appeal against conviction was refused by Hamilton J., but on the application of *Curtis Bennett* on 26th November, the full Court granted leave without expressing any opinion, and gave leave to call a witness.

Appellant was convicted of rape at Derby Assizes on November 6th, before Hugo Young, K.C., sitting as Commissioner, and sentenced to seven years' penal servitude.

Roome for the appellant, who was not present.

The case for the prosecution was that on July 17th, about 3.30 p.m., prosecutrix, a woman of over 50, was returning from market with a younger woman, and carrying a basket on her arm. Appellant came up to them and asked the way to the Gollins, in the neighbourhood of Buxton.

Prosecutrix said she was going part of the way and would direct him. She and the younger woman then parted, and presecutrix joined appellant. They walked together, he carrying her basket, until after crossing a stile their route took them across an open field. While in the field he kissed her, and upon her objecting caught hold of her wrists and dragged her into a small hollow, called a "pit," and there committed the offence.

After the offence was completed, she managed to rise and regain the footpath leading through the field, but he again caught hold of her and tried to drag her back into the pit.

Her son came up at this moment, and she made a complaint to him of appellant's conduct, and all three proceeded to the house of a Mrs. Wain, to whom prosecutrix made a further complaint of having been indecently assaulted by appellant. He denied the offence, but admitted there had been some misconduct, which he said had been started by prosecutrix.

This statement he adhered to at trial, and desired to call a witness named Wardle, who, he said, had witnessed the occurrence, but who had disappeared on the eve of the trial.

Thomas William Wardle, called and examined by ***Roome:*** He had seen appellant and prosecutrix walking together at 3.30 p.m. on July 17th; he was carrying a basket and kissing her, and she appeared to make no resistance. He watched them walking for some 500 or 600 yards, and saw them descend into the pit, but was too far off to see what happened.

Cross-examined by *Sandlands*, for the Crown: He did not give evidence at trial because he fell out with appellant the day before. He could see nothing of what happened in the hollow.

[The LORD CHIEF JUSTICE: This witness carries the case for the defence no furtther.]

Roome: This witness to some extent corroborates appellant's story that prosecutrix was a consenting party, because he agrees that so far as kissing went she made no resistance. After this evidence it would be unsafe to convict him of more than indecent assault. No medical evidence was called in support of the case for prosecution, and the only evidence of rape was the bare word of the prosecutrix.

[The LORD CHIEF JUSTICE: She complained at once to two witnesses, and her clothes shewed there had been a struggle. If

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the facts warrant a verdict of indecent assault, they equally warrant one of rape.]

The sentence is too severe. The learned Commissioner said ten years' penal servitude was the usual punishment for rape, but five years' is more usual, unless the offence is aggravated by great brutality, or the victim is a very young girl.

Sandlands: The offence was a very bad one on an old woman. Appellant also has a bad record—eleven summary convictions for assault, drunkenness, obscene language, &c. Women in this neighbourhood have to go to market over fields alone, and must be protected.

The LORD CHIEF JUSTICE: We are all agreed that appellant was properly convicted of rape. The sentence was justified in the circumstances.

Appeal dismissed.

Solicitors for Appellant: *Baylis, Pearce & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE COLERIDGE.

WALTER JOHN STUDDS.

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Walter John Studds.

If justification is pleaded to an indictment for libel, the whole of the plea must be proved.

This was an appeal against a conviction at the Central Criminal Court on October 21, 1909, for publishing a criminal libel upon William Garner. Sentence of nine months' imprisonment was passed by the Common Serjeant, before whom the case was tried on October 18, 20 and 21. Appellant was also ordered to pay the costs of the prosecution.

The facts of the case were as follows: William Studds, the father of the appellant, a brickmaker, died in 1903, leaving a will, and as executors thereof two of his sons, viz., Joseph and Alfred Studds, and William Garner the family solicitor. Under that will the executors had power to carry on the business, and they did so for a few months. The year 1903 proved to be a bad one for the brickmaking business, and the estate was found to be encumbered with some heavy debts, including a debt of over £9,000 due to a brother of the deceased, who originally owned a share in the business but had been bought out the previous year for £14,000, and had died shortly before his brother. The estate was wound up in Chancery at the end of 1904, and was found to be insolvent. The accounts advanced by William Garner were filed in 1905, and Mr. Fox, chief clerk in Chancery, gave the final certificate in May, 1907, after disallowing certain of the items of these accounts. In the same year, but before this date, a pamphlet had been published in Johannesburg, South Africa, by the appellant, who had been employed as an engineer there some years previously. A copy of this pamphlet was also forwarded to Mr. Fox. It commenced in large type, "Public Notice. One Hundred Pounds Reward! Ashby *v.* Studds," and proceeded to state that £100 would be paid to any one giving information which

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would lead to the sentence of not less than three years' imprisonment on William Garner, senior, and his son Edward James Garner, solicitors, Uxbridge, and of Alfred Studds, for the fraudulent misappropriation and theft of about £25,000 of the estate of the late William Studds. It proceeded to allege that when the estate was under their control they falsified the accounts and made large profits; that upon appellant coming to England in 1904 to inquire into matters, Garner had suggested that the business should be wound up, and then bought back as a wrecked and ruined business for a mere song; that proceedings had been going on for two years, but that through the gross misconduct and dishonesty of the firm of solicitors and chartered accountants and others these accounts had not been properly examined.

This circular was very widely distributed in the neighbourhood of Uxbridge in 1907. In 1908 appellant came to England, and in April, 1908, proceedings were taken against him for criminal libel at the Uxbridge Petty Sessions. An apology was offered, "without prejudice to civil proceedings," and the summons was withdrawn. But in March, 1909, a pamphlet containing the libel the subject of this charge was published by appellant. It was entitled, "Corrupt Administration of Justice," and contained allegations of misconduct and neglect of duty against a number of persons besides the prosecutor, including the Attorney-General, the Public Prosecutor, a County Court judge, the Master in Chancery before whom the accounts were taken, and various solicitors and counsel and accountants who had from time to time acted on behalf of the appellant.

It also contained a number of charges the subject-matter of the indictment against the prosecutor in reference to his conduct of the estate, including perjury, falsification of trust accounts, and embezzlement of trust funds.

This pamphlet was also widely circulated in the neighbourhood where the prosecutor carried on his practice. At the Central Criminal Court appellant entered a plea of justification of all the charges mentioned in the indictment, but humbly apologised to all parties except Garner and his brother Alfred, and gave evidence himself at the trial and called witnesses in support thereof.

At the close of the trial, *I. A. Symmons*, for the prosecutor, submitted that the gravamen of the whole charge against his client was that he had defrauded the estate of £1,740, that no evidence

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had been given of that, and that counsel for Studds had submitted nothing upon the main charges which could be called evidence upon which a verdict of the jury ought to be taken. The Common Serjeant ruled that there was no evidence with regard to any substantial part of the libel. He first directed the jury that there was no dispute upon the fact of the publication of the libel, or that it was defamatory, and then directed them that the plea of justification was not made out. The jury found appellant Guilty on the first issue, and that the justification had not been proved.

Schultess Young, for the appellant (under sect. 10 of the Criminal Appeal Act, 1907), who was present. If there had been any *primâ facie* evidence of justification of the libel, it ought to have gone before the jury. The libel accused William Garner of being perjured and fraudulent, and a number of errors in the accounts of a substantial nature had been shewn to exist, and all of them were in favour of William Garner. They were not mistakes, as had been alleged, and they ought to have been submitted to the jury. It was true that the charge of having defrauded the estate of £1,700 odd had not been dealt with as the gravamen of the charge. The Common Serjeant would not permit a witness to be recalled with respect to his evidence regarding the balance sheets.

(A copy of the libel was then handed up to the Court, and the items of the accounts alleged to be incorrect were dealt with.)

The following passages from the Plea of justification were then read out by the Court:—

"William Garner supplied a grossly falsified copy of his accounts, which carefully omitted his fraudulent entries to the beneficiaries. For this he charged £5 : 5*s*., thus obtaining money by false pretences."

"In paragraph 8 of the affidavit by William Garner and Alfred Studds, sworn December 1st, 1905, they swear:—'With respect to item 537 in the said first accounts which related to the sum of £72 15*s*. 8*d*. for loss of interest on consols. On the 1st day of December, 1903, the executors sold £2,800 of consols, which realised the sum of £2,484 4*s*. (see item 363 in the said account). These consols were sold for the purpose of taking up a bill due to the late Mr. Joseph Studds's executors for £2,550, and these gentlemen claimed £6 19*s* 8*d*. for interest, making a total sum

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due to them of £2,556 19*s.* 8*d*., so that there was a deficiency of £72 15*s.* 8*d.* to meet the bill, and the executors accordingly paid this amount to the deponent, William Garner, on the 15th day of December, 1903 (see item 536 in the said account), and he took up the bill for £2,550 (see item 811 in the said account). The executors of Joseph Studds did not press for the interest, so the same was not paid, and credit is given for it, namely, £6 19*s.* 8*d.* in the executors' account.' Practically the whole of this statement is false. The description 'Loss of interest on consols' is untrue. This amount was simply paid by William Garner and Alfred Studds to William Garner, and embezzled by him. On this fraud being discovered, he, the Alfred Studds, committed the above perjury to hide this.

"The foregoing are a few amongst many others which can be given of wilful and corrupt perjury, false statements, false affidavits, and false figures sworn by William Garner and Alfred Studds in connection with the administration of the estate of William Studds, deceased."

The indictment set out the following extracts from the pamphlet:—

"(a) Who opposed the application of the beneficiaries to be represented by solicitors in the Chancery action, *Ashby* v. *Studds*, and in whose interests was this refused? As Ashby, the only one who had the right to oppose it, did not do so, this can only have been done by this fraudulent and perjured solicitor-executor, William Garner."

"(b) If he can understand that as the business yielded a very large profit whilst under executors' control, he can understand that by William Garner embezzling the funds of the estate and making it indebted to him on paper, he has defrauded the estate of £1,740 through the Court of Chancery."

[The Lord Chief Justice: Was there evidence of a tithe of these charges?]

These accounts were put in and sworn to by Garner as correct. The other side will admit there are errors.

I. A. Symmons, for the Crown. The case is simply this. When all these accounts were examined by the Chief Clerk in Chancery, certain items were disallowed or struck out—not a

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very unusual state of things. There was not the slightest evidence at the trial that the one or two small mistakes made were fraudulent, and it was admitted by Studds, after being shewn the master's certificate, that practically all these disallowances related to payments which were made to beneficiaries under the will, to two of his sisters, a Mrs. Carter and Nellie Studds, with the full consent of all the beneficiaries.

Schultess Young : From the day of the funeral there was evidence of an attempt to defraud. As for the year 1903 being such a bad one for brick-making, the figures given by Garner are shewn by the evidence of the letters to have been inaccurate.

[CHANNELL J. : At the end of the case the Common Serjeant had a discussion with you, and dealt with the evidence item after item. Do you say that any of these rulings are wrong ?]

Other items of the accounts were then referred to, and in answer to Lord Coleridge J., who called attention to the admission that there was no evidence that Garner opposed the beneficiaries' application to be represented in Chancery, the case of *Zierenberg* v. *Labouchere* (1893, 2 Q. B. 183) was cited as overruling *Newman*, Dearsley & P. C. C. 85 ; 1 E. & B. 268 ; 3 C. & K. 252 ; 24 L. J. Q. B. 156 ; 17 Jur. 617 (1852).

[Lord COLERIDGE J. : This case is quite different. You must justify the gist of the libel.]

Studds deposed in chief that Garner had seen him on his arrival in England and told him he (Garner) would ruin the estate and then buy it in cheaply. He told his sister of this the same day. Neither Studds nor his sister was cross-examined on this. Garner did not go into the box, though invited to do so by the judge.

I. A. Symmons, in answer to the Court, explained that a sum of £2,550 in the accounts represented a bill to the executors of Joseph Studds, and in regard to the alleged valuation of the estate referred the Court to the shorthand note wherein the Common Serjeant stated that no evidence had been given that the estate was alleged by the executors to have made a very large profit. It was then suggested that the affidavit of Ashby disclosed this

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fact, but as Ashby himself had already given evidence in the box, permission to refer to such affidavit was refused; and a letter written on behalf of the beneficiary, Nellie Studds, since deceased, by one Thomas Barker, to Ashby, was ruled by the Common Serjeant to be inadmissible.

The LORD CHIEF JUSTICE: The libel complained of, upon a solicitor at Uxbridge, was contained in a pamphlet, of which thousands of copies were distributed. The libel contained charges against the prosecutor which were undoubtedly defamatory with respect to a large number of matters; it charged perjury, the embezzlement of £1,740, the making of false entries to conceal the fact, the selling of falsified accounts, and other offences. The justification alleged was based upon certain entries or items in the accounts which had been put in.

At the trial the Common Serjeant went through very many of these items, and counsel was questioned as to the alleged justification. The result of the proceedings shewed that the indictment contained a number of charges as to which no evidence of justification whatever had been offered.

It was not as if there had been a number of accusations, some important and some trivial, and justification had been shewn for all that were important, but not for the rest. This case was quite on a different footing, and even if, upon some of the lesser charges, some evidence had been offered by way of justification, it was quite clear from the shorthand note that with regard to the real and serious charges of fraud and embezzlement, substantially no evidence at all had been given. It was with these facts before him that the Common Serjeant directed the jury to return a verdict of guilty.

We are of opinion that in the great majority of the substantial charges there was no evidence of justification whatever.

The appeal must, therefore, be dismissed. Sentence will date from November 19th.

Appeal dismissed.

Solicitor for the respondent: *Robinson*, Hounslow.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE PHILLIMORE.

WILLIAM WALLER (*a*).

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William Waller.

Habitual criminal—Consent of the Director of Public Prosecutions.

Notice to prisoner specifying "other grounds" of charge of persistently leading a criminal or dishonest life within sect. 10 (4) *of* 8 *Edw. VII.* c. 59 (*Prevention of Crime Act*, 1908).

The ruling in Turner's *case* (26 *T. L. R.* 112; 3 *Cr. App. R.* 103 (1909)) *as to proof of the consent of the Director of Public Prosecutions only applies when objection has been taken at the trial that such consent has not in fact been given, otherwise the Court may assume that such consent has been given.*

The notice to the prisoner required by the section need not refer to "other grounds" than "the previous convictions" if the prosecution relies on the latter only.

Sect. 1 *of* 8 *&* 9 *Vict.* c. 113 (*The Evidence Act*, 1845), *does not apply to such written consent of the Director of Public Prosecutions.*

Appellant pleaded guilty on November 22nd at the Central Criminal Court to two indictments for coining offences (*b*), and was convicted of being a habitual criminal and sentenced by the Common Serjeant to three years' penal servitude and five years' preventive detention. He appealed against this conviction by leave of Hamilton J. and applied for leave to appeal against sentence.

Herman Cohen for the appellant (under sect. 10 of the Criminal Appeal Act) who was present. Only the three statutory previous convictions were proved. He has always protested his innocence of the second of these charges in 1902 since it took place and petitioned the Home Secretary in respect of it. As to this con-

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(*a*) This report is substantially a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

(*b*) See *Rowlands*, p. 224, below.

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viction as a habitual criminal, it is submitted that the evidence is quite defective. The whole of it is contained in the following two or three lines of the shorthand transcript. "Inspector Arthur Ball, sworn; examined by Mr. Beaumont Morice. Do you prove the formal consent of the Director of Public Prosecutions? Yes. And also the notice? Yes, the notice of being indicted as a habitual criminal which I served on the prisoner at Brixton Prison. What date was it served? On the 8th October. (Notice handed in.) The Common Serjeant: This is the notice. The conviction is, first, on the 1st of October, 1900; second, conviction for burglary, 12th February, 1902; making counterfeit coin, 16th October, 1905. Is that right? Yes." It is submitted (1) that there was not sufficient proof of the consent of the Director, and (2) the fact that there is not a syllable as to the "other grounds" on which the Crown relied to shew he was leading a dishonest or criminal life is fatal to the conviction. The evidence was that he came out of prison on July 16th, 1909, and was re-arrested on this last charge at the end of October. The learned judge in summing-up said, "Also you must find on evidence that he has been up to the time of this offence leading persistently a dishonest or criminal life." It is submitted that this direction cannot cure the want of "grounds" in the notice. In *Turner* ((1909) 26 T. L. R. 112: 3 Cr. Ap. R. 103, above) this Court said that "the grounds" must be clearly stated to the prisoner.

[The Lord Chief Justice: That is, if there are any "other grounds." The three convictions may be enough in a proper case.]

As to proof of the consent of the Director of Public Prosecutions. The statutes creating and regulating his office do not make his signature or documents authorised by him and coming from the proper custody "prove themselves," as the phrase is. Then sect. 1 of 8 & 9 Vict. c. 113 (the Evidence Act, 1845) [read], does not supply the defect. The "official and public documents," it mentions clearly, must be *ejusdem generis* with those in the preamble, and further, the section only applies in cases "in which the original record could have been received in evidence." To make any document admissible there must be statutory authority—that it shall be sealed or signed in a particular way. Then by sect. 14 of 14 & 15 Vict. c. 99 (the Evidence Act, 1851)—which, the authorities say, has superseded the Evidence Act of 1845—"whenever any . . . . document is of such a public nature as to be admissible in evidence in its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence . . . . provided it be proved to be an examined copy or extract, or provided it purport to be signed certified as a true copy or extract by the officer to whose custody the original is entrusted." That only deals with the proof of copies. No enactment, therefore, lets the unproved consent of the Director in. Then, can the Court satisfy itself in any other way, and, if so, how? No doubt the Court could satisfy itself by direct application to the Director, as it does sometimes by application to a Secretary of State, and as it is expressly enacted that it should in sect. 4 of the Foreign Jurisdiction Act, 1890.

[PHILLIMORE J.: It is a common practice in cases under the Vexatious Indictments Act to apply to a judge for leave to add counts. Very often the same judge gives leave and tries the indictment, but very often it is not the same judge. Now, nobody ever proves that that consent has been given. Yet the words are not merely that no bill shall be presented, but that "no bill shall be found." Then there is the decision of Grantham J. in *Dexter*, 19 Cox C. C. 361 (above p. 114), as to the fiat of the Attorney-General.]

The point as to a judge's consent under that Act is suggested now for the first time. Does it not assume that the Director's consent is on the same plane of admissibility as the consent of a judge or the Attorney-General?

[DARLING J.: Might it not be that the fact that the bill is found is of itself a presumption that everything preliminary to the finding was duly done, and that the onus would at least be on the defendant to give affirmative evidence that the judge did not give the statutory consent under the Vexatious Indictments Act?

PHILLIMORE J.: That is possible.]

If this Court rules that the Court of trial may presume the

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consent of the Director, that would be to give very great power to "the proper officer of the Court" at Assizes or Quarter Sessions. That is to assume that the gentleman does not make a mistake.

[DARLING J.: My point was in your favour. In the case of the judge's consent, you might reply, there is the significant fact that the grand jury have found a true bill. It is not simply a bill of indictment with counts in it which, if you look at the depositions, are not supported by them, but something coming from a high authority—the grand jury. That comes down to the judge, and then if any objection were taken that it contained counts for which there was no evidence that the judge had given leave, whether that leave was given or not, proves itself, so to say. But in the case of the Director's consent that objection is not open, and when the indictment is found by the grand jury it must be *presumed* that they had the right to find it.]

Under this Act they must know before the charge of being a habitual criminal is inserted in the indictment.

[The LORD CHIEF JUSTICE: There is nothing in the Act about the consent of the Director being inserted in the indictment.]

That raises the question suggested by Mr. Justice Darling—to what extent the grand jury have anything to do with this consent. Have not the grand jury to be satisfied that the judge has given his consent under the Vexatious Indictments Act, and equally so, under this, of the Director's consent? Then, again, if the consent is not proved, does it not conflict with the broad principle that in a criminal trial there can be no admissions? If the prisoner challenges the fact of consent, it is admitted you must prove it (*Turner's* case, p. 103, above); but if it is not, it is submitted that the judge is bound by the general principle that there are no admissions—not even those favourable to the prisoner. This is unfavourable.

R. D. Muir (with him *Beaumont Morice*) for the Crown. I agree that the statutes mentioned do not touch the point.

[The LORD CHIEF JUSTICE: The Court is satisfied on that point.

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What do you say about *Knowlden* v. *The Queen* (5 B. & S. 532; 33 L. J. M. C. 219; 10 Jur. N. S. 1177; 10 L. T. 691; 12 W. R. 957; 9 Cox C. C. 483; Q. B. (1864)), to which our attention was not called in *Turner's* case?]

It is material, and I am going to cite it. But first, I do not contend that the Court may satisfy itself that the consent has been given in any way it likes, but that until objection is taken the Court is entitled to assume it as a condition precedent, because it will assume that everything has been rightly done. But, as soon as objection is taken, as in *Turner's* case, then the Court must have proper proof. The Court must have it. It is a question for the judge, not for the jury. I do not think that if the Court has got the signature of Sir Charles Mathews to a document that is handed to it, the Court can itself say that it is sufficient. Once it is objected that there is no consent, the Court must proceed to satisfy itself according to the ordinary rules of evidence, and if there is no statute which makes his signature evidence, nor any common law rule which entitles the Court to take judicial notice of it, then it must call for evidence of some sort—some evidence. The analogy of the Vexatious Indictments Act is complete. In *Knowlden* v. *R.* it was held that it is for the Clerk of the Court, its responsible officer, to see that all preliminaries necessary to the preferring of a bill to the grand jury before calling on the prisoner on his arraignment are complied with. *Primâ facie* the prosecution need not prove it.

[Darling J.: When a judge is asked to add counts he simply says, yes; he does not sign or initial anything.]

No; but a record is made in the clerk's book.

[The Lord Chief Justice: I believe sometimes he does, but frequently he does not]

Knowlden v. *R.* decides that it is the duty of the proper officer to see that all preliminaries necessary to the validity of an indictment are complied with before it is preferred and before the prisoner is called on to plead to it. That is clearly made out there. If that is so, in this case the ordinary course is this: The proper officer

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sees before an indictment goes before the grand jury that all preliminaries have been fulfilled. All indictments, by whomsoever preferred, go through the office of the clerk—including "voluntary" ones, and are examined by the Clerk of Indictments. If he sees a flaw he, as a rule, calls attention to it.

[DARLING J.: Otherwise a bill might be brought in for what was neither a felony or a misdemeanour. They would not allow such a bill to be preferred.]

No, the attention of the prosecuting solicitor would be called to it and another bill suggested, or the attention of the judge would be called to it. At Assizes and the Central Criminal Court it is the practice to scrutinise indictments.

The proper time for the defendant to take the objection is before he pleads, but it has been allowed at any time up to verdict. *Fuidge*, L. & C. 390; 33 L. J. M. C. 74; 10 Jur. N. S. 160; 9 L. T. 777; 12 W. R. 351; 9 Cox C. C. 430; C. C. R. (1884), shews that the objection has been allowed to be taken. The marginal note is: "The provisions of the Vexatious Indictments Act must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed. An indictment contained two counts for obtaining money by false pretences on two several occasions, the requirements of the Vexatious Indictments Act having been complied with in respect of one of the cases [counts?] only. The prisoner refused to plead, and a plea of not guilty was entered by the direction of the Court. Evidence was given upon each count, and the prisoner was convicted on each. *Held*, first, that the second count ought to have been quashed, and that therefore the conviction on that count could not stand; and secondly, that as evidence was received which would have been inadmissible upon the trial of the first count alone, the conviction upon that count also was bad." It came before the Court above on a special case after the verdict of guilty. It would not appear on the record, and they could not bring error in the record in consequence of it.

Knowlden's case is an authority for saying that these preliminaries need not appear on the record at all; therefore, the requirements of the Vexatious Indictments Act would not appear on the record. In *Fuidge* Cockburn C.J. said, "the second count should have been quashed," and then, as evidence was admitted on both counts they quashed the whole conviction. There the point was taken at the right time when prisoner was called on to plead, but there are other cases where objection has been allowed any time before verdict. Up till then any count may be quashed if the provisions of the Act have not been complied with as to it. For instance, in *Heane* 33 L. J. M. C. 115; 4 B. & S. 947; 10 Jur. N. S. 724; 9 L. T. 719; 12 W. R. 417; 9 Cox C. C. 433; Q. B. (1864), that case was removed by *certiorari* to the Queen's Bench. The motion was founded on affidavits shewing that the indictment had been preferred before the grand jury without any of the preliminaries required by the statute. Serjeant Ballantine, Mr. Giffard and Mr. H. F. Lewis shewed cause and said "the objection to the want of jurisdiction is too late in its present form after plea pleaded." Cockburn C.J. said: "I am of opinion that there is nothing in the objections urged by counsel for the prosecution, that a motion to quash an indictment cannot be made on affidavit nor after plea pleaded, for I am decidedly of opinion that, if it were made clear, either on the face of the record or by affidavit, that there was a total want of jurisdiction, though it were after plea pleaded, the Court would quash the indictment."

[The Lord Chief Justice: Mr. Justice Blackburn says the same thing at the beginning of his judgment.]

After verdict of course it is another matter. It would be too late to take any objection then. As to the sufficiency of the notice and its not containing any "other grounds" but the three previous convictions, I can only submit that no objection was taken at the trial.

[The Lord Chief Justice: May it not be that those three convictions would be quite enough?]

Yes, but an amended notice has been drafted.

[Darling J.: How is the Clerk of the Court to satisfy himself, before the bill goes up to the grand jury, that the consent of the Director has been obtained?]

He is constantly corresponding with the Director on a variety of matters, and he could easily fulfil the conditions laid down by Channell J. in his judgment in *Turner's* case [p. 155, above], and he is probably acquainted with the handwriting of the Director and Assistant-Director, and would know their signatures.

Cohen, in reply, was asked to confine himself to the question whether, if the proper officer satisfies himself as to the consent, any further proof need be given. That would be to allow an admission to be made in a criminal case. Mr. Muir's argument comes to this: that you may trade on the ignorance of an undefended prisoner on a technical point of law. A Clerk of the Peace at quarter sessions might make a mistake and assume that the consent had been obtained when it had not.

[The LORD CHIEF JUSTICE: If the prisoner takes the point that no consent has been given it might become necessary to adjourn the trial.

PHILLIMORE J.: And this Court would correct such a mistake at once as a miscarriage of justice.]

But it might not be discovered. There are a great many undefended prisoners. Is not that, perhaps, the very mischief against which the statute intended to guard, perhaps suggested by a layman, who thought you were giving officials all over the country too much power? Then, ought not the Court itself to be satisfied affirmatively in every case? This is new penal legislation, and one would have thought that on both grounds the Court would insist on great strictness. The analogy of the Vexatious Indictments Act is certainly very strong, but to adopt the view of counsel for the Crown is to give the Director of Public Prosecutions, a new official, the same privilege as a judge or a law officer of the Crown. However, if the Court is satisfied that there are adequate grounds to the liberty of the subject under the rule advocated by the counsel for the Crown, there is nothing more to be said.

[DARLING J.: It is a pure technicality. The case is one where the prisoner ought to be convicted.]

The whole sub-section is a mass of technicalities, designed, perhaps purposely, as a safeguard to this novel legislation, the principle of which was much debated. The flaw in the proposed rule is that it does not provide for the case of an undefended prisoner who does not know the technical law. As to the "other grounds" of proof that prisoner is leading a persistently dishonest or criminal life, in *Turner* the Court said specific grounds must be stated.

[The Lord Chief Justice: We think Mr. Muir is right that this notice is sufficient. We adhere to what we said in *Turner*—that the notice must state the grounds on which the prosecution intends to rely, but in this particular case the evidence of the three previous convictions—the last being a few months before the latest charge, and for the same offence—would be enough. There are no "other grounds" here.]

The Act directs that the finding must be that he is leading a bad life after the three convictions.

[Phillimore J.: The conviction in this case is evidence of that.]

In this case there is not a scrap of evidence against the appellant between the ultimate and penultimate convictions. Further, the sentence is too severe.

The Lord Chief Justice: In this case, upon the question of proof of the consent of the Director of Public Prosecutions, a point is raised which was not argued in *Turner's* case [p. 103, above], and, on consideration, we think we ought to add something to the judgment of the Court, which was delivered by my brother Channell in that case. The question arises as to the words of the statute: "Provided that a charge of being a habitual criminal shall not be inserted in an indictment (a) without the consent of the Director of Public Prosecutions." What was considered in *Turner's* case, as will appear from the report, was, what degree of evidence was necessary in order to prove the consent when the objection is taken that no consent has in fact been given. The point that has been suggested to the Court, and which, I think, is worthy of consideration, is whether, in the first instance, any evidence need be given at the trial before the petty jury of the consent of the Director of Public Prosecutions. No doubt, this is one of the conditions which must be satisfied in fact, and the indictment ought not to go before the grand jury unless that consent has been given. Just in the same way, under the Vexatious Indictments Act, an indictment containing counts other than those sanctioned or proper without the consent of a judge, cannot go before the grand jury without the consent of the judge being given; and the Court is of opinion that it would be the duty of the Clerk of Assize to satisfy himself, and, if any question arises, of the judge, if the question was brought before him, before the Bill goes before the grand jury, to satisfy himself, that a consent has been obtained. As to how the judge is to be satisfied will depend, of course, upon the materials before him. It may be, as Mr. Muir has pointed out, that the Clerk of Assize will have the document signed by the Director of Public Prosecutions, and know his handwriting, and that will be perfectly sufficient. It is not necessary to consider in what way the Court should be satisfied, but we are of opinion, applying the analogy of the Vexatious Indictments Act, and the decision of *Knowlden* v. *The Queen*, in 5 Best & Smith, at page 532, that this consent of the Director of Public Prosecutions is not one of the matters which the prosecution is called upon to prove as a part of the case before the petty jury. If objection is taken, and, of course, objection may be taken by the prisoner, that there was no consent in fact, then the question will arise in each particular case as to the evidence which the Court will require in order to satisfy itself whether there is any ground for the objection, and then the principle which this Court laid down as to the way in which the thing may be proved if necessary, as stated in the judgment of the Court in *Turner's* case, will apply. It is not necessary to say any more.

With regard to the other point taken, it is objected by Mr. Cohen on behalf of this particular prisoner, that the notice he received in respect of the charge of being a habitual criminal is not sufficient. The Court does not desire to add anything to that which was stated in the judgment in *Turner's* case on this particular question, whether it was necessary to prove that notice was given to the prisoner of the evidence to be called to prove that he was leading persistently a dishonest or criminal life. The Court then said it was not necessary to give notice of the evidence, it was necessary to give him notice of any grounds on which the prosecution intends to rely or any other grounds other than the previous convictions on which the prosecution was going

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to contend he was a habitual criminal leading persistently a dishonest or criminal life. It must be remembered the notice tells him he is going to be charged with having been convicted within the meaning of the statute, and is going to be charged that he is leading persistently a dishonest or criminal life. In this particular case the prosecution did not propose to give anything in evidence except the three convictions, but they proposed to say, having regard to those three convictions (the last of which was five years' penal servitude in the year 1905, so that he had practically been only out of prison a few days or weeks, and was then, if he was convicted by the jury, found guilty of an offence of the same kind), that that was sufficient evidence upon which the jury might find he was leading persistently a dishonest or criminal life. Mr. Cohen, on behalf of the appellant, suggested that there were no other grounds stated in the notice by which the Crown proposed to prove that the man was leading persistently a dishonest and criminal life, other than those three convictions, and the other which *ex hypothesi* the jury would have found him to be guilty of, and that the notice is bad because it does not state some other grounds; in other words, though there are no other grounds, you must state them. It seems to us quite plain that in a particular case the three convictions and the proof before the jury of the particular charge on which he is being tried may be quite sufficient. At any rate, when a jury have found a man to be a habitual criminal on that evidence, it does not make the finding bad or the verdict one which may be set aside because there was no other ground stated in the notice. At the same time we do not in any way go back from the principle laid down in *Turner's* case, namely, that if the Crown is going to rely upon other grounds to shew that the man is a habitual criminal and is persistently leading a dishonest or criminal life, then those other grounds upon which it is intended to found the charge must be specified in the notice. Of course, if the Crown had in this case given evidence of other facts than those which were mentioned in the notice, a different question would have arisen. A point was also argued at the request of the Court whether or not the provisions of sect. 1 of 8 & 9 Vict. c. 113 (the Evidence Act, 1845) apply. We are of opinion that the view expressed by Mr. Muir originally, and which was argued by Mr. Cohen, is right: that that Act only applies to cases where there has been some statutory direction as to a certain document which can be given in

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evidence. The words of the Act are not wide enough to include a document of this class.

The sentence was not too severe.

Appeal dismissed.

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ELIZABETH ROWLANDS.

On the trial of an indictment for making counterfeit coins, evidence of uttering a counterfeit coin is admissible if it tends to prove scienter.

This was an application for leave to appeal against a conviction for making counterfeit coins and also an appeal on points of law. Appellant was indicted with one Waller (see p. 213, above) at the Central Criminal Court on November 22nd, and sentenced, by the Common Serjeant, to four years' penal servitude. Two other indictments, one for being in possession (jointly with Waller) of coining tools, and another for uttering a counterfeit sixpence on 18th October, 1909, were not tried. She had been previously convicted several times, chiefly for brothel keeping.

Herman Cohen for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There was absolutely no evidence from first to last of any overt act done by appellant to assist the coiner Waller, who had pleaded guilty. The undisputed evidence was that she had lived in the rooms of Waller and his wife, who lived with him, for about two months before the police raid on the house on October 28th (when a good deal of coining apparatus and some false coins were seized), but she had been taken in out of charity, having apparently been turned into the streets. She was a woman of a low class, and might be stupid enough not to know what was going on; but even if she did, and did not care, and did not denounce the felony to the police, that might be another crime; it was not the one she was convicted of. But the evidence was compatible with bare presence, and "bare being present can never amount to an aiding and abetting," *per* Raymond, C.J.; *Huggins*, 2 Str. 882; 2 L. Raym. 1574; 17 St. Tr. 309; Foster C. C. 322; 1 East P. C. 331 (1730); and (though she was indicted as a principal) the learned Common Serjeant distinctly told the jury she was an accomplice—it could not be suggested that she was in fact a principal. No doubt when the place was raided she

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was taken surrounded by the materials for coining, but if she was living on the charity of these people and had nowhere else to go, she could hardly help herself. In *Isaacs* (1813), 1 Russell on Crimes, 215 (6th ed.), where the facts pointed much more strongly to prisoner being the accomplice of coiners, the judges held that the evidence was not sufficient. Moreover, there was evidence improperly received, and it was this evidence which probably was conclusive, in the opinion of the jury, against her, and she was undefended. She was also indicted for uttering a counterfeit sixpence about ten days before she was arrested, and at one point the learned judge said: "You do not call" the witness on this point? Counsel answered: "No, that is with reference to another charge." Thus the jury were informed of another charge and, despite his answer, counsel did call the witness at the end of his case to eke it out. Miss Stead deposed that on October 18th appellant tendered her sixpence in payment of 1½*d.* at her shop; that she thought it was a bad one, and put it in the tester and bent it. She gave it back to appellant, who gave her 1½*d.* It is submitted that this is not proof that the coin was counterfeit, and it is still less proof of *scienter*, the only possible ground on which it could be admitted. By sect. 29 of 24 & 25 Vict. c. 99, the Coining Offences Act, 1861, it is not necessary to prove that coin is counterfeit by an expert, but it must be by "a credible witness." In this case the evidence of counterfeitness was quite inadequate. Then how could the passing of one solitary coin prove *scienter*? What was more likely, if she was living in the house of a coiner, than that he gave her the sixpence without her knowing that it was false? Then, there was no case which shewed that evidence of uttering was admissible on the trial of *another* coining offence except against the actual principal. In *Forster*, Dears. & P. 456; 24 L. J. M. C. 134; 1 Jur. N. S. 407; 6 Cox C. C. 521 (1855), such evidence was allowed on an indictment for (another) *uttering*. There Pollock C. B., said: "If evidence is given upon a trial which is not properly admissible, the jury cannot make the reception of that evidence proper by saying that they have not been influenced by it." In *Weeks*, L. & C. 18; 30 L. J. M. C. 141; 7 Jur. N. S. 472; 4 L. T. 373; 9 W. R. 553; 8 Cox C. C. 455 (1861), on an indictment for having coining tools in possession, evidence was—it was held properly—admitted that prisoner had previously passed a bad coin. But he was a principal,

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and was afterwards tried and convicted for the latter offence. *Boober*, 4 Cox C. C. 272 (1850), though similar, was, perhaps, hardly in point. It is submitted, therefore, that this evidence of passing the sixpence should not have been admitted, and that without it appellant would not have been convicted. In summing up the learned judge first assumed that the sixpence was counterfeit and then quite omitted to put to the jury the defence of "bare presence." All he said in her favour was, "If she was" a party to this manufacture of coins, "she is an accomplice with Waller, if she was a party to the making, though not engaged in the coining operations that were going on at that time. If she was an innocent person and these things were being done in which she had no part, of course, you will not find her guilty. If there is no substantial doubt and it is made out to your satisfaction that she was there as one of the gang of coiners who were engaged in making these bad coins, you will find her guilty."

Beaumont Morice for the Crown: The evidence was that when the officers raided the house appellant said, "—— —— here they come," and when arrested, she said "It's all right. Hang it, you can do what you like with me, but my son knows nothing." The latter words were strong evidence of guilt.

Cohen in reply: Even if the officer's account of what she said is true (which she denied), it was the natural language of an old gaol-bird in finding the house was raided. She said, when cross-examining, "I said, 'Certainly, you take me into this woman's room and search me where you like. I have got nothing, I know nothing about the business.'"

The Lord Chief Justice: It does not follow because these prisoners said that the appellant was living on the charity of the Wallers it was true; she was an old associate of coiners. The language she used on arrest was pretty conclusive. "My son knows nothing," probably means, "though I know a good deal." The evidence of passing the counterfeit sixpence was admissible to shew *scienter*. The evidence that it broke when tested was for the jury.

Application and appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING
AND MR. JUSTICE PHILLIMORE.

THOMAS SAUNDERS.

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Thomas Saunders.

Severity of sentence.

On trials for attempted murder, it is desirable that prisoners should be defended by counsel.

This was an appeal against the order of Hamilton J. refusing leave to appeal against sentence of twenty years' penal servitude imposed by Grantham J. on appellant for attempting to murder his wife, at the Central Criminal Court, on November 20th, 1909, and an application for leave to call a witness to character. Leave was now granted by the Court to appeal also against the conviction.

Moran for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant was not represented at the trial by counsel, and Maud Saunders, who had been separated from appellant, her husband, several times, was a witness hostile to him as appeared from her evidence. At the trial she stated they were married in February, 1904, that he had treated her very badly, and she had been obliged to leave him on account of such treatment, that she left him first in December, 1905, that he suggested she should go out and get money to give him, and that by his threats she was compelled to go out on the streets for this purpose. She said that before her marriage she had been a perfectly respectable woman. That was not true. It was true that in February, 1907, appellant had been sentenced to three months' imprisonment with hard labour for threatening her when she refused to live with him. It was true that she had left him, and she may have even supplied him with money upon one or two occasions, but not in the way she described. That accusation was quite unfounded. He had threatened her, and for a particular purpose. He meant to frighten her. It was for that reason he had on this occasion used a revolver. But he had no intention to murder her. He put his arm round her neck and pressed the revolver against her temple, she threw up her arm against the revolver, threw her head back and thereby caused the revolver to go off. It was an unlawful wounding, but appellant only wanted to frighten her.

[Darling J. : The revolver was loaded with some bullets.]

There were five bullets in the revolver, and he intended to shoot himself. He had no recollection of what occurred at the time of the shooting.

Counsel then read the following passage from the shorthand note of the evidence given by Maud Saunders at the trial :—

"About 11 o'clock on September 30th, I was going out of the King's Hall, Elephant and Castle. A gentleman I had been dancing with said, 'May I walk with you?' Appellant came up and said, 'What are you doing with my wife? I advise you to leave her alone.' Appellant then followed me to my flat in Upper Marylebone Street, and asked, 'Are you going to take me in with you to-night?' I said, 'Certainly not.' I opened the hall door with my key; as I opened the hall door prisoner ran up the steps, put his left arm round my neck, and put his right hand in the right-hand pocket of his coat. He had on other occasions threatened me with a razor. I called out. As I called out he placed the revolver against my left temple, actually touching it. I knocked up my left arm and threw my head back; as I did so the revolver went off and I was hit."

It was true that he had his finger on the trigger, and that he put the revolver close to her head, but this was a reasonable defence which, had he been defended by counsel, would have been put to the jury.

It was true that appellant had handed in a written defence in Court saying he lost all his senses, and had no recollection of what occurred, but that referred to what actually took place at the time of the shooting. The statement was not inconsistent with his present defence that he merely wanted to frighten her.

In the summing-up the judge described appellant as "living on the prostitution of another," and quite failed to appreciate the account of the defence how the revolver really went off. His words were:—"She with one arm managed to throw up the arm that was holding her round the neck, and that releasing his arm there, she was able to get her head back," and so "the bullet did not wound her fatally." What really happened was that she threw up her left arm underneath appellant's arm and thereby caused the revolver to go off.

Only two questions were left to the jury, viz., whether appellant shot the woman with intent to murder her, or whether he shot her only intending to do her grievous bodily harm. The natural defence open to the prisoner was not left to them.

As to the sentence, counsel submitted that unsatisfactory evidence had been given against appellant, and that he had a good record in the Durham Light Infantry before his marriage. It was true he had been convicted twice before, but his sentence was very heavy, and he ought to have the opportunity of retrieving his position in life. With respect to the evidence of appellant's wife, counsel submitted that she was of loose character before he married her, and that when the judge informed the jury, "So far as you know, the life he has led as stated by his wife is true," that was unfair to appellant, who should have had the opportunity of calling witnesses to speak to his previous good record in the army.

Darling J.: In such circumstances as exist in the present case, it frequently happens that people who want to kill themselves kill the woman at the same time, and it is therefore absurd to assume that because he wanted to kill himself he did not intend to kill this woman.

The evidence went to shew that he was living on her prostitution; that he put his arm round her neck, pressed a revolver against her temples, and that the revolver went off and very nearly killed her.

It has been argued that he merely wanted to frighten her, but he never put that defence forward at the trial. He now says, "I pulled out a revolver, and in the struggle it went off, I having no intention of shooting her," but before the jury he said he could not remember what happened at all, and neither judge

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nor jury could have divined such a defence as had now been suggested. We do not sit here to try cases where something was not proved which could have been proved, and in this case we think there is no ground whatever for saying he was not properly convicted; and that being so, there is no ground whatever for saying the punishment is too severe. He was sentenced to twenty years' penal servitude. The question really might be, Why should he not be hanged just as much as if the woman had been killed?, for he merely benefits by the accident that she lives.

The appeal must be dismissed on both grounds; but we should like to add that in cases of this kind it would be more satisfactory for the prisoner to be defended by counsel, so that if there is anything in such points as have been raised in this case they would be raised at the trial, and not thought of afterwards, and much time could be saved here.

Applications dismissed.

THOMAS HENRY KELSON.

Thomas Henry Kelson.

On a trial for larceny, there is a presumption of guilt against a defendant who does not give evidence to explain his alleged connection with the proceeds of the theft.

This was an appeal against the order of Hamilton J., refusing leave to appeal against a conviction at Bristol Assizes, before L. Coleridge J., on November 19th, for larceny of 200 bushels of barley. There were also a count for receiving and an indictment for conspiracy.

Appellant, with two other prisoners—Crew and Bush—were committed for trial upon this charge. Crew pleaded guilty to receiving the barley knowing it to have been stolen, and was sentenced with appellant and Bush, who pleaded not guilty, to penal servitude for three years.

A. M. Bulloch for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. Appellant had sent in a long written statement of his defence, in which he stated that he was not defended at the trial, and that he waited for the two other prisoners with whom he was charged to tell the truth about him;

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that when he found they did not do so he was going himself to give evidence in the witness-box, but was asked not to do so by their solicitor. He also complained that the sentence was excessive.

The facts of the case shewed that on September 6th, 1909, a cargo of barley shipped by Louis Dreyfus & Co., grain merchants and shippers, on S.S. "Start," arrived at the port of Bristol. This cargo, or part of it, was unloaded on to some empty trucks belonging to the Great Western Railway at the wharf, ready to be despatched to the consignees. A "checker," an official of the railway company, received the consignment notes relating to the goods so unloaded, which were to be sent off by the railway company; and it appeared that upon September 10th, when the 200 bushels of barley forming part of this cargo were stolen, the checker found at his office a consignment note, dated September 10th, directing the despatch to Winterbourne Station of 200 bushels of barley in fifty sacks, which were stated to be deposited upon a truck numbered 12,454, being one of the trucks containing the barley which had been unloaded from the S.S. "Start." The name of the sender and consignee were both given in the consignment note as "Crew, forage stores, Staple Hill," and carriage was to be paid by the receiver of the goods. Upon September 13th Crew sold one-half of these fifty sacks of barley at 18*s.* a quarter to a man named Cook, who agreed to sell the other half of the sacks for Crew upon commission. On the same day Cook's agent received the goods at Winterbourne Station and paid 11*s.* 2*d.* for the carriage of them. At a subsequent date Crew was charged before the magistrates in connection with the larceny of these goods, and while these proceedings were taking place suspicion fell upon the other men who were engaged in the unloading of the cargo.

It appeared that appellant and the prisoner Bush had both been engaged on the S.S. "Start" in weighing barley. It also appeared that Bush had upon October 26th informed a police officer that the consignment note authorising the railway company to carry the fifty sacks to Winterbourne Station for Crew had been written by him for "a young man who gave him a drink." A cheque for £15 had been drawn by Crew in favour of Mr. T. Kelson upon September 11th, the day after the consignment note had been received by the Great Western Railway. This cheque was first indorsed "Mr. T. Kelson" by appellant, and

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subsequently underneath "Mr. T. Kelson" appellant wrote "T. Kelson." On October 26th when arrested, appellant said respecting this cheque, "I signed it, I don't know what for. I received a letter of trust from a certain party which was sealed, and I took it to Staple Hill and brought the money back. I thought it was a betting transaction. I handed it to the same party, but don't think it necessary to mention names."

At the trial Crew pleaded guilty to receiving the barley knowing it to have been stolen, and upon the trial of the appellant, the jury accepted the view of the prosecution that the cheque for £15 represented payment to him by Crew for the stolen barley.

Counsel now referred the Court to the evidence of Patch, the superintendent of the outdoor grain department of Ford and Canning, warehousemen, of Bristol, for whom appellant and Bush worked as weighers on the S.S. "Start," upon September 10th. The weighers received sheets at the office in the morning, together with orders for unlading to various persons in various parts. It was the duty of the weighers to enter upon the sheets the names of various persons for whom grain was unladed pursuant to these orders. The orders handed to the weighers and their sheets should correspond. The weigh-sheets of appellant and Bush, who were working together on September 10th, were produced at the trial. The evidence shewed that the sheet containing the orders was entirely in the handwriting of Bush, while appellant's sheet did not refer to the consignees at all. The consigning part of the business was therefore, counsel suggested, controlled by Bush. When Superintendent Patch said to appellant, "You would have your orders the same way as Bush," appellant denied it, and said he acted on the instructions of Bush, and Patch admitted that he did not remember to which man he gave the orders.

With regard to the cheque for £15, it is true it was dated September 11th, but across the face of it was stamped September 18th. The date when the cheque was paid in was of considerable importance, but that fact had not been dealt with at the trial.

It was true that appellant had subsequently called at Cook's house on October 24th, and asked Minnie Haskins to take a message under great secrecy, and relating to a betting transaction, to her brother, the prisoner Crew, who was then out on bail. According to Cook's recollection the message contained in the note

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was: "Mr. Crew, if you have not said anything about that cheque I cashed for Dr. Hollis, say it was a betting transaction." Counsel suggested that Dr. Hollis (so-called) was identical with one of the men sentenced at the same time as appellant on a very similar charge, and was the man who, according to the evidence, had charge of the sacks, and it was quite conceivable that he was really the guilty person. Hollis may have thought it safer for the cheque to be made out in the name of a third person, and all that appellant did may have been to go and cash the cheque for him.

The prosecution had failed to make out their case about the cheque, there was nothing to connect it with the stolen barley, and it may never have been given for the barley at all. Minnie Haskins was called by the prosecution at the instance of the appellant himself, and appellant went to Cook's house that day because he was frightened. Upon Crew's arrest he would naturally become anxious as to what had taken place about the cheque, and he may have then suspected for the first time that the cheque was somehow connected with the stolen barley.

A statement by a third person had been received as evidence against the appellant. Asked what Crew said when he got the above message from appellant, Minnie Haskins said his words were: "What is done they are bound to be in it, it's no good." Counsel submitted that this was not evidence on the count for larceny against the appellant, and in the summing-up this phrase was again mentioned to them.

The judge in summing-up said: "The suggestion is that with the view of getting out of this difficulty confronting him, Kelson conceived the idea that he would say that this money was a betting transaction. Well, in that you know he is not upheld by Crew, who is the person who paid the cheque. Crew doesn't say he paid the cheque in regard to a betting transaction. He paid the cheque because he was a receiver of stolen goods, and impliedly paid it to the person from whom he received them."

Counsel submitted that the summing-up was entirely one-sided, and suggested that the jury were likely to infer from this statement in the summing-up that Crew, who had pleaded guilty, had impliedly or expressly made some statement or confession to this effect.

The Lord Chief Justice: A number of men were engaged in

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this very serious larceny and conspiracy. The material part of the case against the appellant related to the proceeds of this larceny. Kelson was found to have indorsed a cheque to his own order for £15 two days after the larceny, and no suggestion was made of there being any payment to be made to him in respect of any business transaction or any other transaction. The cheque was somehow alleged to be drawn in connection with one Hollis, one of the men. according to counsel's suggestion, who were sentenced as being concerned in these frauds, yet in the face of these suspicious circumstances Kelson did not give any evidence at the trial on his own behalf. If he knew nothing about the larceny of the barley he must have given evidence, and we cannot accept the explanation that he did not give evidence because he was not defended by counsel.

After the arrest of Crew, for some reason he got anxious, and went off to a friend's house and requested that the message should be sent to Crew about the cheque. Why should Crew have been told to say the cheque was for "a betting transaction," and why should Hollis be one of the men connected with the transaction? In the face of that evidence, and the fact that the robbery was one in which several people were necessarily involved, we are of opinion that the jury properly drew their conclusion that this cheque was part of the proceeds of the robbery.

With regard to the sentence of three years' penal servitude imposed, several men were convicted of this serious charge, and a large quantity of property was stolen and then sold at a low price. We see no ground whatever for interfering with that sentence.

Applications dismissed.

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Charles Cohen.

CHARLES COHEN.

Corroboration under the proviso in sect. 2 *of* 48 & 49 *Vict. c.* 69, *the Criminal Law Amendment Act*, 1885.

This was an appeal on a point of law against conviction at Lewes Assizes, before Lawrance J., after a trial upon November 12th and 13th, 1909. There was also an application referred to the full Court by Hamilton J., for leave to appeal on the facts.

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Appellant was indicted upon seven counts, and was convicted on two, viz., count (1) for procuring a girl under twenty-one years of age for the purpose of carnal knowledge (under sect. 2 (1) of the Criminal Law Amendment Act, 1885); count (2) for procuring a girl to become a common prostitute under sect. 2 (2) of that Act. Three counts charged a conspiracy to commit these offences. Upon counts (5) and (6) the jury were discharged without a verdict. He was sentenced to 18 months' imprisonment with hard labour. The girl's age was between sixteen and twenty-one.

S. P. Low for appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The facts of the case were, as appeared from the story of the prosecutrix, that appellant had known her for some years, that he was on friendly terms with her, and had lent money to the girl's sister's husband. The prosecution said that appellant continually met her in the streets of Brighton, and asked her to go to London to a restaurant where she would get better wages. In May, 1909, she agreed to go to London, and gave notice to her mistress. As a week was to elapse before she went away, prisoner took her to a respectable house for two nights. He himself went to her sister's for two nights before she went away. No impropriety had taken place between the parties, but upon May 15th she went to the station with appellant, and was told by him they were going to Blackpool. It appeared from her story that she went with appellant to Preston, and that she was there introduced to a man named Stevens, and a tall German, that appellant left her at Preston, and that she went on to Blackpool with the others. She was there taken to a house, seduced, and sent on to the streets by Stevens. After seven weeks she left him owing to his cruelty, and went to Manchester. She was found by her father and brought home.

Dealing with the question of corroboration, counsel submitted that by the proviso in sect. 2 of the Criminal Law Amendment Act, corroboration of the girl's story was required in "some material particular." There was some evidence that appellant was seen talking to the girl in Brighton, and also at a public-house. There was evidence that she went to the house in Brighton with appellant. But with regard to the proceedings upon May 15th, there was, it was submitted, no corroboration whatever. The evidence, so far as it went, all pointed to the fact that the appellant had not gone to Preston. And these proceedings on 15th May were relied on by the prosecution as the chief evidence against appellant. That evidence had to go to the jury because of the conspiracy counts, and there was no verdict upon those counts.

Dealing with the counts for procuring, counsel submitted they ought not to have gone to the jury; that the proceedings on May 15 were the material particulars on those counts, and that there was no corroboration.

W. B. Campbell, for the Crown, was not called upon.

The **Lord Chief Justice**: Upon the evidence of the girl the statutory proviso as to corroboration certainly required to be satisfied. The story is a remarkable one. It is true that there was no evidence of improper conduct between appellant and the girl. But that is not the offence. The offence here is "procuring" a girl for the purpose of becoming a common prostitute.

The story must be looked at as a whole, and its commencement must date from what happened at Brighton. With regard to the girl's evidence, she says that she went with appellant as far as Preston. There is no evidence that she went further, and it has been submitted that there is no evidence that she went from Brighton to Preston with him. It is quite clear that Stevens went to Blackpool on that day, and also that at the end of the journey she is found at Blackpool with him. The appellant did not go into the box, and the question must be asked, how was the girl induced to go to Blackpool to meet Stevens? No reasonable explanation has been given why appellant should have engaged lodgings at Brighton for her, though it was suggested to the jury that his action with regard to taking the lodgings for her was innocent. We may assume that the jury did not believe that defence, for it would be remarkable that an innocent man should not go into the box to give that evidence. The fact that for two nights this girl goes to lodgings provided by appellant is clear. We doubt whether it was only for two nights. But even if that be so, can it be said that there is no corroboration of the girl's story in that incident?

It is true that if we neglect that which happened at Brighton, Mr. Low's argument with respect to the corroboration would be a strong one, but you cannot sever what happened before, and there is corroboration in the fact that she was taken away from lodgings found for her by this man and from which she went to

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Blackpool. This evidence was before the jury, and they did not take the view that appellant had nothing to do with the subsequent action of the girl.

Appeal dismissed.
Sentence to run from date of conviction.

WALTER HENRY PORTER.

Walter
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Indemnification of bail—Conspiracy to indemnify bail without intent to interfere with the course of justice, or to enable accused person to abscond—Act tending to produce a public mischief—Respective functions of judge and jury in criminal trials—Special verdict.

An agreement between an accused person and another that if the latter will become bail he shall be indemnified against loss in the event of the bail being forfeited, is a crime in that it tends to a public mischief.

Such an agreement is a crime, notwithstanding that an intent to defeat the course of justice or to enable the principal to abscond is not alleged in the indictment, or, if so alleged, has been negatived by the jury.

Decision and dictum of Martin B. in Broome, 18 *L. T.* (*O. S.*) 19 (1851), *disapproved;* Stockwell, 66 *J. P.* 376 (1902), *held to have been wrongly decided;* Brailsford, (1905) 2 *K. B.* 730; 75 *L. J. K. B.* 64; 93 *L. T.* 401; 54 *W. R.* 283; 69 *J. P.* 370; 21 *T. L. R.* 727: *K. B. D., followed and applied.*

Appellant was, with two other defendants, tried before Mr. Justice Jelf at the Worcestershire Autumn Assizes on the 25th and 26th October, 1909, upon an indictment consisting of five counts which alleged in various forms a conspiracy to indemnify bail. The facts proved were that in the preceding May one George William Clark, being under arrest upon a charge of felony, applied to two friends, appellant and another, that they would become bail for him; they had both been bail for him on a former occasion; they accordingly became bail for him in the amount of 50*l.* each at Sparkhill Police Court, both on his remand, and later, upon his being committed for trial. Upon his being released on the earlier occasion he took them at once to his bank, saying, "Now we're old chums, and I'll see to you first," and there he handed to each of them the sum of 50*l.*, being the amount in which each had become bail. On the 28th of June, the day

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appointed for Clark's trial, he did not surrender at the Worcestershire Quarter Sessions, having in the meantime absconded. His own recognizances and those of his bail were estreated. The two sureties were in attendance at the Court, and each paid to the clerk of the peace the sum of 50*l.* In his summing-up, Mr. Justice Jelf directed the jury that such an agreement was indictable as a criminal offence, even though the parties did not enter into it with the intention that justice should be defeated and the accused person be enabled to escape; he asked the jury to find a special verdict, and to assist them, put to them several questions, of which two concerned appellant: Was Porter a party to an agreement with Clark that if Brindley (another defendant) would go bail for him (Clark) in 50*l.* each, he would give them 50*l.* each as security, so that Brindley and Porter should lose nothing if he absconded? If so, was Porter a party to such agreement with the intention that Clark should abscond?

To the first question the jury answered "Yes," but to the second, "No."

Mr. Justice Jelf ruled that the findings amounted to a verdict of "Guilty," and bound appellant over in his recognizances in the sum of 20*l.* to come up for judgment.

F. W. Sherwood for the appellant: In the first place, I desire to point out that the learned judge obtained from the jury a special verdict by putting to them questions; but my submission is that he omitted, in doing so, to comply with the established rule applying to special verdicts; see 4 Bl. Com. (1813) p. 328; and Littleton's 1st Institute (Co. Litt.), 227a; and the notes in Hargrave & Butler's edition of Co. Litt. The learned judge ought to have directed the jury that they had a perfect right to find a general verdict, and that the finding of a special verdict must be entirely the free choice of the jury. The judge failed to point out the rule, and in doing so he acted contrary to all the recognized precedents.

[PHILLIMORE J.: Surely when a judge puts (as I sometimes myself do) questions to a jury in order to help them and himself in arriving at a decision, the answers are not necessarily in the nature of a special verdict.]

I should so contend; and here he expressly said that he was asking them to find a special verdict.

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[The Lord Chief Justice referred to the trial at Bar of *Jameson* and the persons who took part in the Raid into the Transvaal.]

The procedure followed in that case, *Jameson and Others*, 12 T. L. R. 593-4; Report from Shorthand Notes, pp. 395-6 (1896), supports my contention. There L. Russell C. J., though he shewed most strongly his opinion that the bounden duty of the jury was to convict, and put a series of questions tending to attain that end, nevertheless, before putting them, laid down that the jury had a perfect right to find a general verdict, and after putting the questions, repeated his words, and again, in answer to a juror later on, he stated the rule most emphatically to be so. I raise this point because the question may turn out to be one of substance; for I doubt whether the answers of the jury afforded justification for a verdict of guilty being entered on all the three several counts in respect of which I understand findings of guilty have been recorded. I am entering a sort of *caveat.* I do not concede that the jury can be taken to have found a verdict of guilty applicable to any count except the count which alleges the bare agreement to indemnify, without any intention to defeat the course of justice or intention that the principal should abscond; the finding of the jury that the appellant had not the last-mentioned intention must be coupled with their other finding; the only possible specific form that in such a case as this an intention to defeat the ends of justice could take would be an intention that a man should fly from justice; and surely the jury in negativing the special intention must be taken to have negatived the general intention, of which the latter intention is the only conceivable instance, in this case.

Acland, K.C. (with him *Coventry*) for the Crown, in answer to the Court, said that he accepted the position that appellant stood convicted upon that count which alleged merely the bare agreement to indemnify; the sole question was whether such an agreement was in itself a crime.

Sherwood: My friend's statement meets my point as to the verdict. Now, my contention is that the bare agreement is not a crime. No contrary *dictum* can be found in any authority; the masters of Crown law are silent upon the matter; for instance, *Tremaine's Precedents* (1723), though containing many precedents and forms of various misdemeanours, and especially misdemeanours tending to pervert justice, has none like the present case; so also, *Wentworth's Precedents* yields no example. There is no reported case. My contention is that such an agreement constitutes no indictable offence; to make such an agreement a misdemeanour, the intent to defeat the ends of justice (or to enable the principal to abscond) must be proved; the gist of the offence is the wrongful intention, and must be laid in the indictment and proved. I do not mind whether such intent is alleged generally or specifically, but there must be the intent. It is not my contention that a jury may not quite rightly infer, from the very fact of entering into the agreement, the wrongful intention, but they are not bound to do so; there may be circumstances from which juries may, and indeed ought, to infer innocence. For instance, a man might in a spirit of loyal friendship become bail for another; afterwards the principal, knowing that the surety could not afford to lose the amount of the recognisance, might, for fear that the surety might be haunted with misgivings, take care that he should be indemnified; he might say, "Though I am innocent and shall not abscond, yet as a gentleman and a friend I cannot bear to think that you may sleep any the less soundly by reason of your undertaking this great obligation, so I place to your account the sum of which you might be the loser, though my courage will not fail me and I shall stand my trial." Suppose, further, that the surety, in spite of this, should keep watch and ward over the principal, and take every step to see that he faced his trial, and even should exercise all the rights which are said in the books to belong to a bail (see Petersdorff on *Bail* (1824), c. 7, "Of the Privileges and Liability of the Bail," p. 514), would not a jury be entitled to acquit of a wrongful intent? If such an agreement is *per se* a crime, then it would also be a crime for a bail to insure at Lloyds' against the disappearance of his principal, yet such a thing must have been often done, and may be innocent of wrongful intention and even laudable; as for example, if after going bail, a man were to lose his fortune and to insure so as to be able to pay the amount of the recognisance. Suppose he indemnified himself so as to save a bare competence for his children, could the doing this be a crime apart from all desire to defeat justice? I know that the learned editors of *Archbold*, 23rd ed., pp. 111, 112 and 1091, take a different view; but they base themselves upon decisions of the Civil Courts that contracts to indemnify bail are against public policy, which they may conceivably often be. Such authorities as there are in criminal law are in my favour. Martin B., in *Broome* [headnote], twice laid it down in Chambers, after argument upon applications to admit certain defendants to bail, that it was no objection to persons tendering themselves as bail that they had been indemnified by or on behalf of a prisoner; and following Martin B., the present Recorder of London in *Stockwell* [headnote], held that the bare agreement to indemnify is no crime. The decisions of the Civil Courts which have held such agreements void on grounds of public policy are *Wilson* v. *Strugnell*, 7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 218; 14 Cox C. C. 624; 45 J. P. 831 (1881); *Herman* v. *Jeuchner*, 15 Q. B. D. 561; 1 Times L. R. 445; 54 L. J. Q. B. 340; 53 L. T. 94; 49 J. P. 502; 33 W. R. 606 (1885); *Consolidated Exploration and Finance Co.* v. *Musgrave*, (1900) 1 Ch. 37; 64 J. P. 89; 69 L. J. Ch. 11: 81 L. T. 747; 48 W. R. 298. These are well-known authorities, and I am not concerned to contend that they were not well decided; but it is worthy of note that in *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J. C. P. 229; 1 Jur. N. S. 936; 13 W. R 554 (1855), Jervis C. J., in delivering the judgment of the Exchequer Chamber to the effect that an action is maintainable upon an agreement to indemnify a person who had entered into recognisances for an accused for the payment of the costs of a criminal prosecution, said that probably an agreement to indemnify bail against forfeiture for non-appearance of a culprit was bad as offending against the rule of public policy, and left the question open as if there were no authority. Moreover, in *Cripps* v. *Hartnoll*, 8 L. T. 768; 32 L. J. Q. B. 381; 10 Jur. N. S. 200; 11 W. R. 953 (1863), the Court of Exchequer Chamber, reversing the Court of Queen's Bench, held that a promise to indemnify a bail against forfeiture in the event of the failure of a defendant to appear to answer an indictment for misdemeanour at the Old Bailey was not a promise to answer for the debt or default of another within the Statute of Frauds (29 Car. II. c. 3, s 4), and the plaintiff had judgment; at no stage of the proceedings did any Court say that the action was not maintainable on the ground of public policy, still less that the agreement was a crime; if the agreement were criminal, the Court would surely, *mero motu*, have stayed an attempted abuse of its procedure. I submit finally, that if the

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nature of bail as at present understood, and the fact that, as here, the justices do not, as a rule, trouble themselves nowadays to inquire whether a person tendered as bail is indemnified, or going to be, or not, are considered, and the very form of the recognisance be regarded, the liability of the bail begins and ends with the forfeiture of the amount named in the recognisance, which, upon default of the principal, becomes a debt due to the Crown. Bail is merely a form of suretyship. There is no means of enforcing upon the bail any obligation to dog the footsteps of his principal or not to lose sight of him; those methods he may adopt, if he likes, for his own protection. In these days almost all bailed defendants surrender; and it is no longer thought to be a duty on the part of the bail to do more than accompany the accused to trial, or, failing his appearance, to pay the accruing debt to the Crown. It is not a crime in the bail to fail in surrendering his principal; there is no crime committed save when there is a plot or intention that justice should be defeated.

Acland, K.C., for the Crown: I contend that an offence, an indictable misdemeanour, is committed when the agreement is made, and that the Crown is not under the obligation to do more than prove the bare agreement. The gist of the offence lies in the fact that the agreement has a tendency to produce a public mischief; it is not necessary to allege in the indictment, or to prove, a definite intention to defeat the course of justice. The cases already cited shew that the Courts regard the agreement as unenforceable as being against public policy. I agree that it is not enough, in order to support a criminal prosecution, to prove merely the doing of that which is against public policy: not all such acts are criminal, but some are. This is one. It falls within the class of acts tending to bring about a public mischief. The test to apply is this: Did the act alleged and proved against the appellant tend to produce such mischief, apart altogether from the question whether appellant did or did not intend that the principal should abscond and so defeat the ends of justice? The question must be answered in the affirmative. Such tendency was inherent in the act itself, and the jury needed no more than proof that the act had been done. There is ample authority, especially *Brailsford* [headnote], the false passports case, in which it was held that any wrongful act tending to the public mischief is criminal, and indictable as a misdemeanour. In that case the learned Chief

Justice (Lord Alverstone) directed the jury, as a matter of law, that the obtaining by one person in the name of another of a passport was an act having such a tendency, and that it was their duty to find a person so acting guilty of misdemeanour. The ground here upon which such an agreement as this must be deemed to have such a tendency is that the agreement deprives the public of the security that the accused person will surrender and take his trial. The principle has long since been recognised in many older cases. For example, in *Alderman Sterling*, 1 Levinz, 125; 1 Siderfin, 174 (1664), a conspiracy to diminish the King's revenue by impoverishing the officers of Excise; *Wheatley*, 1 W. Bl. 273; 2 Burr. 1127 (1761), *per* Lord Mansfield C. J.; *De Berenger*, 3 M. & Sel. 67; 15 R. R. 414 (1814); a conspiracy to raise the price of public funds by false rumours, as being a fraud upon the public; and *Scott* v. *Brown, Doering, McNab & Co.*, and *Slaughter and May* v. *Same*, (1892) 2 Q. B. 74; 61 L. J. Q. B. 738; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213, C. A., where Wright J. refused to proceed with the trial of a case when the facts disclosed a conspiracy by all the parties to rig the market. These cases all shew the criminality of acts tending to a public mischief; and the indemnification of bail must have such a tendency.

Sherwood, in reply, pointed out that in *Brailsford* [headnote], Lord Alverstone C. J., though directing the jury very strongly that the acts there complained of had such a tendency and that the acts spoke for themselves without need of proof of tendency, did, nevertheless, leave the whole question to the jury upon the general issue. I say that this course should have been followed here.

The Lord Chief Justice: This case raises a very important question, affecting the course of justice. The appellant has been tried upon an indictment which charged him with having entered into an agreement with an accused man named Clark, whereby the appellant was indemnified against any loss which he might suffer from the forfeiture of the amount of the bail, if Clark should abscond. It is now clearly established by authority, and, indeed, the contrary has not been argued, that no action could be brought on such a contract; the principle has been well stated in the very valuable judgment of the late Mr. Justice Stephen—a great authority—in *Wilson* v. *Strugnell* [above, p. 241], and also in the judgment of Lord Esher M.R., in *Herman* v. *Jeuchner* [above, p. 241]; the decision in the last-named case is binding upon this Court. In these judgments and in that of North J., in *Consolidated Exploration and Finance Co.* v. *Musgrave* [above, p. 241], we concur. Counsel agree that to make an act criminal it is not enough if it be merely against public policy. Many acts might be mentioned, which, although offending against the rule of public policy, are not criminal; it is not enough to make a contract criminal that it is unenforceable. This we do not question. Counsel for the Crown was right in his contention that this act, if criminal, was so because it was an act tending to the public mischief. In the opinion of the Court the agreement for indemnification of bail by the accused man was such an act. Speaking for this Court, I adhere absolutely to all that I said in delivering the judgment of my colleagues and myself in *Brailsford* [headnote] That was the case of a conspiracy to obtain by false pretences a passport in one man's name in order that another person might use it. That case was fully and most ably argued for the defendant, and all the cases bearing on the subject were dealt with either in the argument of Sir Robert Reid or in that of Sir Robert Finlay (then Attorney-General), and were carefully considered by the Court. I there said: "It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law; but the distinction between acts which are merely improper or immoral, and those which tend to produce a public mischief, has long been maintained": (1905) 2 K. B. 745. Elsewhere (*ib.* 746) in the same case I said: "Without saying that there cannot be acts upon which an innocent construction might be put, or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can be possibly urged in this case. In criminal, as well as in civil, cases persons are responsible for the natural consequences of their acts. . . . . We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given." It remains, in applying this principle, to see whether Mr. Justice Jelf was right in ruling that it was a matter of law that such an agreement tended to produce a public mischief. The appellant's counsel has argued that to make the agreement a crime it must be proved that it was entered into in order to defeat the ends of justice—in other words, that the accused person, the principal, should abscond. Now, applying the test, which was the right test, according to the case of *Brailsford*, I find it difficult to imagine a state of circumstances in which such an agreement as this would not tend to produce a public mischief. It is to the public interest that criminals should be brought to trial. The taking of sureties for the attendance at their trial of accused persons is the only security the public has; so it was that for many years it was held that sureties were personally responsible for the surrender of an accused, and if they knew that he intended to abscond, they ought to have him arrested. The counsel for the appellant has urged that in the altered conditions of modern life, no other duty is expected or exacted from the bail than that of paying the amount of the recognisance on the principal's failure—that, in short, he makes a bargain with the Crown whereby he becomes a debtor to the Crown, and that if he pays the debt he is relieved of all responsibility unless it can be expressly shewn that he was party to a design to effect the escape of the culprit. If such an agreement were lawful, what possible interest has the surety in the principal's appearance? Baron Martin has, no doubt, said in *Broome's* case, that it was no objection to a proposed surety that the person in whose behalf bail was tendered had promised to indemnify the bail; the Court, however, has no hesitation in holding that *dictum*, and any decision which followed it, *e.g.*, *Stockwell* [above, p. 237], to be wrong. It was said that as the justices had not inquired whether the appellant was to be indemnified, no offence had been committed. But, accepting the rule in *Brailsford*, that makes no difference. Therefore, in the judgment of the Court, an agreement between an accused man and another, that if the latter would become bail he should be indemnified against loss if the bail was forfeited, is not only an unlawful contract in the sense that it is not enforceable in the Civil Courts, but is also unlawful in that it tends to produce a public mischief. It was not necessary for the jury to find on evidence (other than the

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proof of the making of the agreement), that it so tended. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the Appellant: *Blewitt & Co.*, Birmingham.

Frank Villars.

FRANK VILLARS.

Extension of time for appealing

This was an appeal against sentence, leave having been granted by Mr. Justice Coleridge on 7th December, 1909. Appellant was convicted of burglary, before the Chairman at Middlesex Sessions, on February 8th, 1909, and sentenced to ten years' penal servitude and three years' preventive detention.

Appellant, in person, stated that at the time of his conviction he was under the impression that to appeal against his conviction would entail expense which he was unable to meet. He further stated that he was informed subsequently by the Governor of Parkhurst Prison that he would not have to incur expense in any steps he might think fit to take with a view to appealing against his sentence, and that he forthwith applied for leave to appeal.

(The facts of the case were not, otherwise, of general interest.)

Felix A. Davis, for the Crown, was not called on.

Appeal dismissed.

John Simpson
Oliver.

JOHN SIMPSON OLIVER.

A fraudulent trustee who has admitted a misdemeanour previously to disclosing it in the legal proceedings mentioned in sect. 85 *of* 24 *&* 25 *Vict.* c. 96 (*the Larceny Act*, 1861), *cannot claim the benefit of that section.*

This was an appeal against conviction at York Assizes upon November 18th, 1909, for fraudulent misappropriation of £130 on June 20th, 1907, as a trustee appointed under the will of the late Thomas Plews. Appellant was sentenced by Bucknill J. to six months' imprisonment without hard labour.

W. Hedley for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present. The facts of the case were that in 1891, Thomas Plews, a farmer of Bolton, died, leaving a widow and a daughter, Mary Plews. Under the will of the deceased, his daughter Mary Plews, an infant, had been left certain property, the capital of which was not to come to her until she had attained her majority. It was stated by the prosecution that appellant had, as trustee of this property under the will, misappropriated the sum of £130, to which Mary Plews was entitled upon the 20th June, 1907, when she came of age. Interest had been paid on the money by appellant up to that date, and subsequently he offered to pay £30 per annum, the interest to go on. At the trial these facts were not disputed, but it was proved in cross-examination of the witnesses for the prosecution that proceedings had been previously taken against the appellant in the County Court, that he was then duly sworn, and that he had admitted all the facts, and that judgment was given against him. No subsequent payment had been made by appellant, but counsel submitted that by sect. 85 of the Larceny Act, 1861, appellant's admissions on oath in the County Court were a bar to his conviction on this charge. The words of that section are :—" Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency, and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any Court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved." The indictment against appellant was framed under sect. 80 of the Larceny Act, 1861. At the trial counsel submitted that there had been a full disclosure in the County Court under sect. 85. He could not, however, deny that appellant had made the same admission to Mary Plews before the County Court case, and he admitted that *Skeen and Freeman*, Bell, C. C.

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97; 28 L. J. M. C. 91; 5 Jur. N. S. 151; 7 W. R. 255; 8 Cox, C. C. 143 (1859; under a similar section) was against him.

T. Cuthbertson, for the Crown, was not called upon.

The Court refused to allow the appeal against conviction, but allowed the sentence to run from the date of conviction.

Appeal dismissed.

John Kelly.

JOHN KELLY.

"Habitual criminal" within sect. 10 *of* 8 *Edw. VII. c.* 59 (*Prevention of Crime Act*, 1908).

Whether accused "is leading persistently a dishonest or criminal life" may greatly depend on his conduct between the present offence and his last release from prison, and the jury must be pointedly directed to this interval.

This was an appeal against conviction as a habitual criminal at Middlesex Sessions upon 27th November, 1909. Appellant was convicted of the larceny of a bundle of trousers, of the value of 3*l*., the property of a clothier, and also of being a habitual criminal. The Chairman sentenced him to penal servitude for three years, to be followed by preventive detention for seven. An application for leave to appeal against the conviction for the larceny was referred by L. Coleridge J. to the full Court.

F. Watt for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Upon the evening of October 18th, two dozen pairs of trousers were stolen from the shop of a clothier at Acton. They were hanging on a nail near the door. A woman entered the shop and said a man had taken a bundle of trousers from outside the shop, that his name was Kelly, and she had been watching him standing outside hanging about. Appellant was arrested the next day, and identified by the same witness. Counsel, after submitting that the evidence of this witness was not satisfactory, and that there was no other evidence to connect appellant with the larceny, dealt with the objections to his conviction as a habitual criminal.

In the first place, no proper notice was given to appellant

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under sect. 10, sub-s. (4), of the Prevention of Crime Act, 1908, that it was proposed at the trial to prove that he was persistently leading a dishonest or criminal life, and it was not admissible for the Crown to rely on anything not in the notice. He cited *Turner*, 26 T. L. R. 115; 3 Cr. App. R. 103 (1908). Secondly, with regard to what had happened since appellant's last conviction, a period of about nine months had intervened between his last release and his arrest on the present charge—from January 27th, 1909, to October 18th, 1909. In spite of that, the Crown, in fact, had brought forward no evidence to shew how he had been engaged during that time. This was a critical period, and it was essential that evidence should be supplied on this point by the prosecution.

[The Lord Chief Justice: The Crown could not give evidence of misconduct in this period, if it was not in the notice.]

Two detectives, in cross-examination by appellant, said they had not seen him doing any work, while another detective said that he had been arrested on suspicion, but discharged. All this did not amount to any evidence against him.

On the other hand there was considerable evidence that he had done work during this critical period, viz. :—

(1) He had worked in September at Paddock Wood, and letters had been received from a farmer there asserting this.
(2) He had sold flowers to certain persons, and there was some evidence of this.
(3) He had a basket of flowers when arrested.

(A letter from the Roman Catholic chaplain of the prison to the Registrar was read, to the effect that appellant had been working while out of prison.)

There was a third objection to this conviction—that he had not been told, when charged with this offence, that he could give evidence if he liked. See, in support of this objection, *Warren*, 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. R. 194 (1909).

[Phillimore J.: He had been told so on the primary charge, and it was unnecessary to tell him so a second time.]

Counsel submitted finally that the summing-up was defective. The following passages were quoted from the summing-up:—

"The next question you have to determine is: Is he a habitual criminal? Now it seems that he has been convicted no less than sixteen times since the time when he was sentenced to three days' imprisonment for stealing in 1884. He has been ten years in penal servitude, and he has had sixty-two months under terms of imprisonment. . . . . I think it is more than probable that he has done some work, and I do not myself see that is inconsistent with his being a habitual criminal. He may work, and then when the temptation comes upon him, he gives way to his old practices."

After dealing with the evidence of such work, the Chairman continued: "But supposing, gentlemen, that he is this man who did work on these occasions, you are then face to face with the fact that there are these other convictions against the prisoner. I think it would be a terrible thing if a man never did an honest stroke of work in his life, but it is for you to say, gentlemen, is he the man that has been convicted on those three particular occasions, and do you also find him to be a habitual criminal owing to the fact that there have been all these numerous convictions against him, although they are at intervals? If you are of opinion that he is a habitual criminal, of course you will find him guilty."

The Chairman, before appellant addressed the jury on his own behalf, had previously said to him:—

"You are charged, you see, with having been convicted on three occasions, namely, in 1900 for stealing a till, for which you got twelve months; in 1902 you got four years' penal servitude for stealing money, and in 1906 you were sentenced to eighteen months for causing grievous bodily harm. Then, in addition to that, the jury have found you guilty of stealing the trousers from this shop, and in addition to that, they will find whether you are a habitual criminal, and it is for you to convince the jury that you are not, because, I take it, you do not dispute the convictions that have been proved against you. Therefore, if you can succeed in proving to the jury that you are not a habitual criminal, then they may find a verdict of not guilty against you."

Counsel submitted that the jury were improperly directed that they could find appellant guilty of being a habitual criminal from the previous convictions merely, and notwithstanding the interval of nine months which had elapsed from the last release, and that the attention of the jury should have been drawn to that crucial period.

Purcell, for the Crown, upon the question of the necessity of notice of the grounds of charge being given to appellant, referred the Court to *Turner* (above, p. 103), but that decision was not given at the time when this notice was drawn. As to the period of nine months which had elapsed since appellant's release there was some evidence as to what had happened. The officer who identified appellant as being a man who had been previously convicted under the name of O'Brien, and who had had his licence revoked, stated that he had never seen appellant do a day's work. And no satisfactory evidence had been given to contradict that with reference to the period between January and October.

In answer to the Lord Chief Justice whether the jury had been sufficiently directed upon the question whether appellant was "persistently" leading a dishonest life, counsel said he feared that until the two recent cases, *Turner* and *Waller* (3 Cr. App. R. 213; 26 T. L. R. 142 (1909)), were decided by this Court, magistrates had not adequately realised the extent of their duty. Even now it was not quite clear what " persistently " meant in this connection.

The Lord Chief Justice: It has been argued that with regard to preventive detention imposed upon the appellant, the actual bearing and effect of sect. 10 of the Prevention of Crime Act, 1908, and the notice under sub-sect. 4 thereof, have not been sufficiently considered. The Act of Parliament is a very difficult one, and we do not lay down any rule that of necessity the jury cannot find appellant guilty of persistently leading a dishonest life merely because he has gone back to his former evil practices. What the jury in fact have to find must depend on the circumstances of the particular case, which, therefore, may become of considerable importance.

We do not attach much importance to what the Chairman said at an early stage with respect to appellant satisfying the jury that he was not a habitual criminal. But it does seem to us that a judge should direct the attention of the jury to any period of importance, any interval between the present and the last conviction, which might affect their minds in deciding whether or not he is a habitual criminal. And in this case there does seem to be evidence that the man had been working, and the Chairman

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seems to have assumed that he had been working. We think that there should have been in the summing-up a direction to the jury to take into consideration that particular interval in this case. The Act indicates that the prisoner must be *persistently* leading a dishonest and criminal life, and we think that the Chairman did not sufficiently direct the minds of the jury to that point.

The Crown did give evidence with respect to the period between January and October. We think the summing-up relies too much upon the three previous convictions being themselves sufficient to warrant the finding by the jury that he was a habitual criminal—that may be so in a proper case. It was for the jury to say whether, having regard to those convictions and the other circumstances of the case, he was a person persistently leading a criminal life. We have no doubt upon that part of the case which relates to the conviction for stealing the bundle of trousers, and the period of penal servitude for three years must stand, but the sentence of seven years' preventive detention will be quashed.

Conviction as habitual criminal quashed.

Alfred
Graham.

ALFRED GRAHAM.

On an indictment for sending a threatening letter demanding money, evidence of the contents of similar letters, themselves the subjects of untried indictments, is admissible.

This was an application, referred by Hamilton J., for leave to appeal against conviction and sentence at the Central Criminal Court upon November 18th, for sending to one Sydney Neville Noakes upon July 18th, 1909, a letter demanding money with menaces. Appellant was sentenced by Grantham J. to three years' penal servitude.

Appellant was jointly indicted with one Stratton (see p. 255, below), and both prisoners were convicted upon the above indictment. The verdict was "Guilty, but we consider that he was led on by Stratton." Three other indictments which charged them with similar offences upon later dates, viz., July 29th, September 19th, and September 24th respectively, were not proceeded with.

Rowsell for the appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant was convicted with Stratton upon the first indictment, which alleged that upon July 18th, 1909, they sent and uttered a certain letter demanding money with threats, but in order that antecedent knowledge of the contents of this particular letter might be shewn to exist, later letters, which were the subject of other indictments, had been admitted as evidence against the appellant, and such evidence was, it is submitted, inadmissible.

It appeared that the prosecutor about three years ago had one evening taken too much to drink and lost certain articles belonging to him, including a watch and gold knife. A short time afterwards these articles were handed over to him by a man, not either of the prisoners, to whom he gave a sum of £15.

In November, 1908, the same property was again stolen from him, but restored in December, 1908. About the middle of June, 1909, he received a begging letter written by a man named Graham, who was unknown to him. That letter he destroyed. But upon July 19th he received the following letter, the subject-matter of this indictment, from an address given as 10, Little Queen Street, Edgware Road, written by Stratton :—

"Sir,—I understand from my lodger, A. Graham, that you are a great and intimate friend of his. I might mention that on the strength of his assertions I have advanced to him considerable sums of money, dating from the time when he borrowed 30*s.* from me on the security of a gold pocket knife, which you left in his rooms at my house."

This letter, which was addressed to the prosecutor at his private house and marked "Private, Urgent," concluded :

"If I do not hear from you by Thursday next, I shall conclude that you are away from London, as Graham surmises; in that event I shall call at Selsdon Park, for I understand that Mr. Noakes, sen., is also acquainted with Graham, and he may in your absence feel dispesed to attend to me himself."

The prosecutor treated this as a blackmailing letter, and replied :—

"Sir,—I am in receipt of your letter dated 18th July, and beg to give you notice that if you or any of your gang annoy me in any way whatever, I will instantly place the matter in the hands of the police."

Subsequently letters of a threatening nature were written by the two defendants to him upon July 29th, September 19th, and September 24th.

With reference to the letter of July 18th, counsel said it was quite true that Graham agreed to Stratton writing a letter, and he must have told him some of the circumstances mentioned therein, but he submitted that beyond that there was no evidence that Graham had any knowledge of the contents of the letter. The later letters were the subjects of other indictments. It may have been that they were full of threats, but as matters now stood, appellant could be tried upon these other indictments if the Court were of opinion that there was no evidence against him upon the first indictment, and allowed the appeal.

He further submitted that the learned judge had not properly directed the jury to distinguish the cases of the two men, appellant and Stratton. Also a serious mis-statement of fact with regard to the evidence had been made in the summing-up, in the following passage:—"Mr. Noakes told you that on one occasion he did drink with some one in a public-house, but he does not know where he went afterwards, or where he was at the time. It is possible that Graham is telling you the truth when he says that Noakes was taken to his house, and that may have been the occasion on which the man who was brought here to-day may have seen him." That was clearly a mistake, for the evidence shewed at the time of the alleged "drugging" appellant was not living at, and had never been to, the house in Little Queen Street. Furthermore, it was misleading, as suggesting to the jury that the appellant had been a party to the "drugging."

In conclusion, counsel submitted that as appellant had been jointly indicted with Stratton he would rely upon the point of law to be raised on behalf of that prisoner.

Stratton's case was heard by the Court before judgment in this was given (*a*).

Application dismissed.

(*a*) See p. 258, below.

ARTHUR CECIL STRATTON.

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Arthur Cecil Stratton.

Notwithstanding that the fact of a previous conviction has been illegally elicited in cross-examination, if the judge has successfully checked its influence on the mind of the jury, and the Court is satisfied that there has been no miscarriage of justice, the Court will not interfere.

This was an appeal against conviction at the Central Criminal Court upon November 18th for sending to one Sydney Neville Noakes upon July 18th, 1909, a letter demanding money with menaces (see p. 252, above).

Appellant, who had been twice previously convicted for larceny and for housebreaking, was sentenced to five years' penal servitude by Grantham J. The grounds of appeal involved questions of law. An application for leave to appeal against conviction upon the facts was referred by Hamilton J.

A. J. Lawrie for the appellant (under sect. 10 of the Criminal Appeal Act), who was present.

At the trial, in cross-examination by Mr. Gill, appellant's character, which up to that time was not in issue, had been improperly dealt with, in violation of sect. 1 of the Criminal Evidence Act, 1898. He referred the Court to the following passage in the shorthand notes, dealing with the alleged visits of the prosecutor to the appellant's house:—

"What do you say now, did you ever see him at your house?—Yes, most decidedly I have, at least three times.

Then you say he is not telling the truth?—He is not.

Now at last you have told me; had you in August just come out of prison?—Yes, I had."

It is true that the learned judge, at the time, did his utmost to prevent that question and answer doing appellant any harm, but the harm had then been done.

[*Bodkin*, for the respondent, drew the Court's attention to the following questions put by Grantham J. to the jury after the verdict:—

Grantham J.: "Gentlemen of the jury, before we go into this any further I should like to ask you whether you did act on my suggestion—that you took no notice whatever of the fact whether Stratton had been previously convicted or not?"

The Foreman of the Jury: "Yes, my Lord."

GRANTHAM J.: "You took no notice of it whatever?"

The Foreman of the Jury: "Quite so, my Lord."

At the conclusion of the case the learned judge said: "I cannot give you leave to appeal; I took every precaution to prevent any mischief arising."]

[The LORD CHIEF JUSTICE: We all agree that the answer elicited by Mr. Gill did not let in the cross-examination.

PHILLIMORE J.: In such a case I should discharge the jury. if I thought it sufficiently serious; but if I did not, I should not.]

Counsel for appellant then referred to the case of *Charnock* v. *Merchant*, (1900) 1 Q. B. at 476; 69 L. J. Q. B. 221; 82 L. T. 89; 48 W. R. 334; 64 J. P. 183; 19 Cox C. C. 443, and quoted the following words of Grantham J., who quashed the conviction in that case:—"Unfortunately in this case the magistrates have taken a course which was illegal. They allowed a question to be put to the appellant which was not legally admissible. It may be that the fact of the previous conviction did not affect their judgment, though they do not say that; they only say that his answer did not affect their minds. I am of opinion that the conviction was wrong."

It is true that in that case the magistrates allowed the question to be put, but he submitted that if it were possible for the judge to get over the difficulty of an improper question having been put, by telling the jury to take no notice of it, it would be almost impossible to call a witness who had been previously convicted.

[PHILLIMORE J.: That is hardly fair to the Bar. Prisoners known to be previously convicted have very frequently gone into the box to give evidence on their own behalf.]

It would be dangerous for them to do so. He submitted that the question put by Mr. Gill went deeper than a mere question of character. Directly the jury were aware that Stratton had been previously convicted, he at once became in their minds an associate of thieves. In addition to that, the story told about the gold pocket knife alluded to in the letter of July 18th would then appear in a different light to them, and might explain to them how appellant had obtained that information about it.

[DARLING J.: It is far more probable that the jury drew their conclusions from appellant's intimacy with Graham.]

Dealing with the summing-up, counsel argued that it was strongly antagonistic to appellant. A distinction ought properly to have been drawn between appellant and Graham, and the jury should have been directed to consider whether one man was guilty and one innocent. Furthermore, no suggestion had been made that appellant should have the benefit of the doubt.

With respect to the evidence of the letters, these letters ought to have been separated. The learned judge said:—

"It is quite clear that the letters amounted to a threat of accusing Mr. Noakes of disgraceful conduct." That was a question which ought to have been left to the jury to decide upon. The facts of the case shew that the appellant had denied from the beginning to the end of the case that he ever wished to make any imputations upon Mr. Noakes.

The evidence before the jury shewed that Graham, who had been living for some time before June, 1908, at 10, Little Queen Street, had gone to live at 7, Newnham Street about the middle of June. There was nothing to justify the statement of the learned judge in his summing-up that there was evidence that appellant and Graham were working together, and the fact that a telegram had been sent to Mr. Noakes by Graham, warning him of a visit by appellant to Selsdon Park, did not justify that view. If the Court held that the bulk of the letters were capable of an innocent interpretation, then both appellant and Graham ought to be acquitted, but he submitted that the evidence of the letters had not been properly left to the jury, and that with regard to the letters themselves a distinction ought to have been drawn between the different letters.

Bodkin, for the respondent. There was substantial evidence before the jury that for three months these two men had been in

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daily communication with each other. He referred the Court to the judgment of Channell J. in the case of *James Nicholls*, 1 Cr. App. R. at 168 (1908), who said:—"It was true the learned judge had omitted to discuss the defence raised on behalf of appellant in his summing-up. But if he had adverted to it he might have done so unfavourably. The jury had heard the defence. The Court could not interfere on this ground unless it was of opinion that if the learned judge had not made the omission the result would and ought to have been different. The complaints of the summing-up rested on no question of law, but on an allegation of a miscarriage of justice within sect. 4, sub-sect. 1 of the Criminal Appeal Act."

The LORD CHIEF JUSTICE: The appellants, Graham and Stratton, were closely connected with each other for several months. Up to June, 1908, Graham had only been writing begging letters, but upon June 18th the letter was written which is the subject of the present charge.

That letter clearly shews an attempt to extort money. The information contained in it must have come from Graham, and, dealing with his case first of all, we are clearly of opinion, after considering all the circumstances of the case, that the jury came to the conclusion that all the letters were part of one story. We, therefore, think that there is no ground for saying that the jury were improperly misled by insufficient direction.

In the case of Stratton, the facts are that he was cross-examined with regard to his statement that the prosecutor had been to his house. This had been denied by the prosecutor, and the question was put to appellant: "Then you say he is not telling the truth?" He was then asked whether he had just come out of prison. His counsel interposed, and the judge ruled that the prisoner's statement did not justify such cross-examination. We agree entirely with that ruling. The judge, in answer to Stratton's counsel, said that he would tell the jury that they ought not to consider it in any way, and finally, before notice was taken of it, he again cautioned the jury. If this had been left to the jury, there could have been no unfairer instance of cross-examination. We repeat what we said on this point in *Evison* [above, p. 76]. The answer given was only a contradiction of a material fact which the prisoner was entitled to make, not an imputation of any kind, and it is only in exceptional cases where prisoner has used an answer in cross-examination to tack on something fresh that any such cross-examination to credit can be justified. But we think in this case that, in the circumstances, there has been no substantial miscarriage of justice.

In the case of *George Lucas*, 1 Cr. App. R. 235 (1908), Walton J. says:—

"It was clear that the learned Commissioner appreciated the nature of the bastardy proceedings, and corrected any prejudice which their accidental introduction might have created, by *warning the jury* not to be influenced by them." And here the jury were cautioned, and everything that was possible was done to correct the effect of the question put to appellant in cross-examination. The evidence against him was overwhelming, and the conspiracy between the two men—it was that or nothing—was quite clearly made out. As there has been no miscarriage of justice, the proviso to sect. 4 of the Criminal Appeal Act applies.

With regard to the argument that the jury were not directed to give the prisoner the benefit of the doubt, we are quite sure that Mr. Lawrie must have pointed this out to them at the trial.

The appeal against conviction is dismissed.

Appeal dismissed.

Solicitors for the Respondent: *Knapp-Fisher & Sons.*

WILLIAM PAYNE.

There may be a conviction of a receiver of stolen property without proof of exclusive possession on his part.

Technical objections must be taken at the trial.

This was an appeal from a conviction before Mr. Commissioner Rentoul at the Central Criminal Court on November 24th, 1909. Payne was indicted with Smith and Diggin for burglary, and was convicted of receiving goods knowing them to be stolen. Smith and Diggin pleaded guilty to the burglary. Payne was sentenced to four months' imprisonment in the second division.

Schultess Young for appellant (under sect. 10 of the Criminal Appeal Act), who was present. It appeared from the evidence of one Harris that Payne went to his shop, where he carries on

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business as a metal dealer and jeweller, on Monday, 11th October, and asked if he bought old silver. In a few minutes he returned with Smith, who carried a sack containing silvered goods, and left them with Harris on his promise to consider the price, and both men left. Harris communicated with the police, and the next day on Smith's calling he was arrested, and Payne, who had refused to go to the shop, was arrested while in charge of the pony and trap with which he had driven himself and Smith from his house in Chiswick to Rotherhithe, where Harris lived. On this evidence alone counsel submitted there was no evidence of receiving. Further evidence had been improperly admitted of Detective Sergeant Gale, who had stated what Smith had said to him in Payne's absence.

[Darling J.: But you must have known what he was going to say, for he only followed the depositions, and you might have stopped him.]

To object to it would have been fatal in the eyes of the jury, as it was alleged that Payne was in collusion with Smith, who had pleaded guilty.

[Darling J.: No, not as Payne was being tried alone.]

A further point is that the judge had misdirected the jury when referring to the evidence of Smith and Diggin, who had sworn that Payne knew nothing of the robbery: "Of course the other prisoners have both tried to get this man off if he is a guilty man, and that of course is to their credit. They may have had to plead guilty when they saw no help for themselves. Why on earth should they try to drag in another man, especially if he was a friend of theirs? That would be putting human nature a great deal lower than committing a burglary puts it." Such a direction made it positively impossible for a prisoner, however innocent, to call the guilty parties as evidence. Moreover, there was not a tittle of evidence to suggest that the prisoners Smith and Diggin were friends of Payne. The learned Commissioner elsewhere said: "The prisoner (Payne) has been given a perfectly good character. He apparently up to this time had done nothing wrong of any sort as far as is known. He got into financial difficulties, it is true, and he seems to have acted as fairly and honestly as a man could. His witnesses to character were not cross-examined in the slightest degree, or any aspersion cast on their veracity at all. We must admit on the evidence he is a man of perfectly good character." Smith and Diggin were convicted thieves well known to the police. How could it, therefore, be suggested without any evidence that they were friends of Payne, and had therefore creditably perjured themselves in an attempt to get him off? Payne went into the witness-box, gave evidence on oath, and was cross-examined. But on the evidence of the prosecution itself – uncontradicted—I submit there is no evidence whatever of receiving. I rely on the case of *Wiley*, 20 L. J. M. C. 4; 2 Den. C. C. 37; 4 Cox C. C. 414; 15 Jur. 134 (1850). The judgment of Coleridge J. more than covers this case.

This was argued before twelve judges, eight of whom decided there was no evidence of receiving and four differed from the majority. The case has been acted upon time after time, and is the leading case. Here the prisoner Wiley lit a candle, and shewed the way into a stable to several men bearing the admitted proceeds of a robbery. The goods were turned out of a sack carried by one of the men and spread before the prisoner, who was actually engaged in bargaining as to the price when they were all arrested and subsequently tried and found guilty, but Wiley of receiving only. Platt B. said, in the course of his judgment, there must be a possession "exclusive of that of the thief." Parke B.: "It is not, I think, a receiving of stolen goods if you receive the thief with the stolen goods." This is exactly what the evidence shews Payne to have done. His business was admitted to be that of a carrier, and whether he knew the goods were stolen or not, he had no control of the goods nor joint control of them for a single instant. He took the thief and the goods to Rotherhithe. Even if he took a message for the thief, and so helped him knowingly to get rid of the proceeds of the burglary, he was not guilty of receiving, though he might be guilty as an accessory after the fact.

[The LORD CHIEF JUSTICE: Can there not be a joint possession?]

Certainly, but no case has gone the length of deciding that it can be otherwise than a potential exclusive possession, exerciseable

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by the one or the other. See *Archbold*, C. P. 550 (23rd edn.); *Smith*, 24 L. J. M. C. 135; 10 D. & P. C. C. 494; 1 Jur. N. S. 575; 3 W. R. 484; 6 Cox C. C. 554 (1855); and *Miller*, 6 Cox C. C. 353 (1853); C. C. R. Ir., both in my favour. In Payne's case Smith took good care not to leave him alone with the goods for a moment He was willing to use him as a messenger or go-between, but not to give him any possession of the goods. When two persons come into touch regarding stolen property, there is always a dividing line which has to be passed before the continued sole possession of the thief is lost and merged with that of some other person. There was no evidence of that in this case.

Macdonald, for the Crown, was not called on.

PHILLIMORE J.: It is wrong to say that there must be exclusive possession by the receiver. No case says that receiver and thief may not have joint possession. The case of *Wiley* has been relied on by counsel for the appellant, but the decision in that case was upon a question of fact; and while all the judges agreed that there must be some possession, the majority of them held that there was in that case no evidence of possession. There was here ample evidence to go to the jury of possession by Payne, and the jury may well have believed that Smith and Payne were jointly acting together. Moreover, as counsel did not take the objection at the trial that there was no evidence of joint possession, it is too late to do so here. It has been argued that certain evidence was improperly admitted, but no objection was taken at the trial, and the evidence might even have been of some advantage to the appellant. Furthermore, as Smith was called as a witness, this matter might have been put to him in cross-examination. It is unnecessary, therefore, for the Court to say whether that evidence was admissible or not, and the appeal must be dismissed.

Appeal dismissed.

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Henry Hedges.

HENRY HEDGES.

Rape—"Fresh complaint" and corroboration considered.

This was an appeal, by leave of the full Court, which, on 10th December, 1909, overruled an order of Hamilton J. refusing leave, against conviction at Maidstone Assizes, upon November 20th, for rape. Appellant was sentenced by Lawrance J. to ten years' penal servitude.

Ronald Smith for appellant (under sect. 10 of the Criminal Appeal Act), who was present. Appellant lived with his wife and family in two rooms in Chatham. Upon September 26th, 1909, his wife left home at about 2.30 a.m., and returned at a few minutes to 6 o'clock. The story of the prosecutrix, who was the daughter of appellant, aged 15½ years, was that at about 4.30 on the above date her father called her down from the room in which she was sleeping upstairs to the lower room, which was the bedroom of himself and his wife, and forcibly had connection with her.

The evidence of the mother was to the effect that on her return she found the prosecutrix nursing the baby over the fire in the lower room; that she said to her in the presence of appellant, who was then in bed, and woke up: "What are you up for? Why could not Henry (an elder brother) get up?" And that she answered: "Father called me."

Upon October 4th appellant came home drunk and created a disturbance, when the prosecutrix for the first time mentioned appellant's conduct to her on September 26th. At the trial appellant denied the offence imputed to him, but admitted that he had called the girl down to light the fire and prepare for her mother's return. He said he was asleep when his wife returned, and had not heard what she said to the prosecutrix.

A doctor who had examined the prosecutrix, stated that the hymen was lacerated, that the laceration was not recent, and that there was no further sign of injury. He also stated that the condition of the girl was consistent with frequent sexual intercourse. At the police court prosecutrix said appellant had had connection with her on two previous occasions, but no evidence as to this was given at the trial.

When charged with the offence, on the 7th October, appellant was practically drunk, and was alleged to have said:—

"*I do not know what I have been doing of. I have had a lot of drink lately.*"

Counsel submitted that there was no corroboration of the story told by the prosecutrix sufficient to sustain a charge of this nature. The only evidence that was in any degree corroborative was the evidence as to the complaint and the evidence of the doctor.

The evidence with regard to the complaint did not satisfy the requirements laid down in *Osborne*, 1905, 1 K. B. 551; 74 L. J. 311; 92 L. T. 393; 53 W. R. 494; 69 J. P. 189; 21 T. L. R.

288; C. C. R.—where the whole question was dealt with—as being necessary before that class of evidence could become admissible. Evidence as to complaint was only admissible when the complaint was made at the first opportunity after the offence which reasonably offered itself. But here the complaint was not made until eight days after the alleged offence, and although given every opportunity of doing so the girl was unable to explain why she made the complaint on the particular occasion on which it is alleged to have been made.

Lillyman, 1896, 2 Q. B. at 171 (*per* Hawkins J.); 65 L. J. M. C. 195; 18 Cox C. C. 346; 60 J. P. 536; 74 L. T. 730; C. C. R., was also cited.

With regard to the evidence of the doctor, the only issue before the jury was whether an offence had been committed upon September 26th, and the doctor's evidence was useless as corroboration. He stated that the laceration of the hymen was not recent, and that there had been frequent sexual intercourse. The effect of that evidence was simply to account for the absence of corroboration.

The learned judge had misdirected the jury in saying that they might regard either of the above pieces of evidence as corroboration of her story.

Warren, 2 Cr. App. R. 194; 73 J. P. 359; 25 T. L. R. 633 (1909), is an authority for the proposition that a judge must give a proper and adequate direction where corroboration, as here, was of a slight character. *Everest*, 2 Cr. App. R. 116, 130; 73 J. P. 269 (1909), carries the matter as to corroboration no further.

It is true that the wife stated that the prisoner was in a position to hear what she said to the prosecutrix on her return, and that the prisoner denied in cross-examination hearing this conversation. These two statements are not necessarily in conflict, as the wife's evidence is merely an expression of her opinion as to the position of the prisoner for hearing the conversation.

In any case the statements themselves are not of a sufficiently relevant character to be regarded as evidence against him.

With regard to his statement to the police inspector when arrested, even if that could be regarded as corroboration, the effect of it was destroyed because appellant was admittedly drunk at the time. He was undefended.

[The LORD CHIEF JUSTICE: It cannot be assumed that because a man is undefended, he cannot properly put his defence forward. This appellant must have been convicted under the Incest Act.]

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Henry Hedges.

Eustace Fulton, for the Crown, was not called upon.

Phillimore J.: This case was properly left to the jury, and we think that there was sufficient corroboration of the story of the prosecutrix. The complaint, the doctor's evidence, and the prisoner's denials in cross-examination, and, finally, the statement he made when arrested, are all facts that the jury were entitled to take into consideration as being to some degree corroboration of the girl's story. An admission made by a man when drunk may not be so weighty as if he was sober, but it is some corroboration.

Appeal dismissed.

BERTHA SULLIVANT.

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Bertha Sullivant.

A slight irregularity in cross-examination, amply provided against by the judge, is not a ground for appeal.

This was an appeal from the order of Mr. Justice Coleridge, refusing leave to appeal against conviction at the County of London Sessions, on December 3rd, 1909, for abandoning and neglecting two children under the age of sixteen years, under sect. 12, sub-sect. 1, of 8 Edw. VII. c. 67 (the Children Act, 1908). She was convicted with one Frances Ruth Studd. Sullivant was sentenced by the Deputy-Chairman to six months' and Studd to three months' imprisonment, both in the second division. There was also an application for leave to call further evidence.

Maxwell Thin, for the appellant, who was not present. Appellant had been a nurse at the St. George's Infirmary, Fulham Road, for about eighteen months, and then became a superintendent of a home for homeless and orphan children under the management of a Dr. Street, with Studd as an assistant. In March, 1909, upon Dr. Street's death, the home was given up; but subsequently appellant and Studd started a similar home, taking with them some of the children who had been at the old home. This home was at No. 224, Barcombe Avenue, Streatham, and consisted of a small flat of five rooms. On September 1st, being without funds, they sublet four of these rooms, and left two girls in the remaining room, while they went to different subscribers in the country for assistance.

It was stated at the trial, on behalf of the National Society for the Prevention of Cruelty to Children, that the two children were discovered in a filthy condition and poorly nourished. It appeared that small sums had been sent to them by appellant, in all amounting to 12*s.* 6*d.*, over a period of five weeks. The family who lived in the rest of the flat had not undertaken to look after the children, but it seemed that £1 was owing by them for rent to appellant.

A certain witness relied upon for the defence was stated by the counsel for the prosecution at the trial to be too ill to be called. It was true that counsel could have read her depositions at the trial, but the defence desired to cross-examine her, and because she was not called the jury was deprived of that cross-examination. In the second place, a certain article from "Truth," which was absolutely unconfirmed, and which related to a Home carried on by Dr. Street, was improperly put to her in cross-examination. The article was headed "An Orphan Monger and his Live Stock," and the description which followed had a marked effect upon the jury.

[DARLING J.: She accepts the position that she conducted the Home with Dr. Street.]

Thirdly, a most important witness, Maud King, who had stayed at this particular flat, and visited it when appellant was away, could have said that the two children had plenty of money. That witness did not answer to the call, and only appeared after the summing-up, when counsel pointed her out at the time to the judge.

[PHILLIMORE J.: It must be a matter of discretion for the judge whether a witness should be called out of time.]

(A proof of the witness it was desired to call was then handed up to the Court, but the Court thought that it would not help appellant.)

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Bertha Sullivant.

Appellant asserted that money had been sent in letters to the children, not only, as had been stated, amounting to 12*s*. 6*d*., but other sums had been sent as well, amounting to 28*s*. 6*d*. in all. Furthermore, a lodger in the house owed rent to the amount of 1*l*., and appellant thought the lodger would pay this sum to the children.

The LORD CHIEF JUSTICE: In this case appellant was sentenced to six months' imprisonment in the second division for wilful neglect of two children, under sect. 12 of the Children Act, 1908. For appellant it is argued in the first place that a witness before the magistrate was not called by the prosecution, and counsel was therefore unable to get out something he might otherwise have done in cross-examination. This is mere surmise, and not a ground for appeal. Her evidence before the magistrate was not favourable to the appellant.

A second point relates to another witness, who was not present till the end of the summing-up. That evidence, so far as it went, would not be of the least avail against positive testimony as to the actual state of the children, who had been left for weeks unattended and with utter lack of money.

With regard to the question of improper cross-examination, appellant had laid herself open to the questions put to her by vouching the good conduct of certain houses, and saying that she had been connected with them. She was therefore open to cross-examination with respect to their condition. The form of the questions put may have assumed that the statements so made were true, but the judge most carefully directed the jury to deal with the case apart from this evidence, and we do not think there is the slightest ground for saying that the jury came to a wrong conclusion. We do not think in the circumstances a sentence of six months in the second division is too severe.

Application dismissed.

Solicitor for the Appellant: *H. J. Sydney.*

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Edward Gee.

EDWARD GEE.

Severity of sentence—Where a report of medical men suggesting mental degeneration, not amounting to insanity, has been considered by the judge at the trial, and the offences extend over a considerable period, the Court will not interfere.

Appeal from L. Coleridge J., refusing leave to appeal against a sentence of eighteen months' imprisonment with hard labour for larceny from the Post Office, inflicted at Liverpool Assizes by Mr. Justice Ridley on November 20th.

Lindon Riley for the appellant, who was not present. The appellant was a Post Office servant, but this is not an ordinary Post Office case. For thirty-two years he maintained an excellent character, and had attained a position in which his salary was 2*l.* 4*s.* per week and his retiring allowance 21*s.* a week.

[PHILLIMORE J.: But he has pleaded guilty to two offences as far apart as 1906 and 1909.]

Yes, but on each occasion the article stolen was almost valueless, at all events to the appellant. In 1909 it was a box of chocolates, which he ate before his fellow clerks and the wrapper of which, addressed and surcharged, he threw into the office waste-paper basket. In 1906 it was a cigarette case, which he never used, and which, five days after his suspension, with the intervening opportunity for destroying or concealing it, was found in his dining-room by a Post Office detective. Character tends to become permanent. Some foreign cause must have intervened to change the appellant's. It was neurasthenia. At the trial two surgeons (one an eminent mental specialist) attended to prove this, and, although they were not sworn, a report of theirs was read. Here are extracts:—" We formed an opinion that he was suffering from neurasthenia, with delusions of persecution. . . . . We are quite certain that his action was the result of impaired judgment. . . . . His mind was in an unhealthy and unsound condition." True, he had pleaded guilty, but this mental state was proper reason for re-considering so severe a sentence.

PHILLIMORE J.: In this case Mr. Justice Coleridge has already

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Edward Gee.

refused leave to appeal, and the Court sees no reason to interfere with that decision. Mr. Justice Coleridge, equally with Mr. Justice Ridley, had the advantage of seeing the report from which extracts have been read. It is based on an examination of the prisoner after his detection, but the prisoner had commenced a series of petty thefts so long ago as 1906. His mental depression was probably the result of a pricking of his conscience. He was not insane, and had been quite properly advised to plead guilty. His health would be looked after in prison. As to the offences themselves, the Court did not think the sentence too much, and it would not interfere with it.

Application refused.

Solicitor for the Appellant: *James C. Gibson*, Wigan.

DIONYSIUS THEADORUS.

Dionysius Theadorus.

There is a presumption that the accused, on a charge of receiving stolen property with guilty knowledge, will, if innocent, explain his possession on oath at the earliest possible moment.

Severity of sentence.

This was an appeal from an order of L. Coleridge J., refusing leave to appeal against conviction and sentence. Appellant was charged with John Shorrock and James Powell, at Liverpool Assizes upon December 1st, 1909, before Ridley J., with stealing and receiving a parcel of cotton of the value of about 20*l*. Powell was acquitted. Shorrock was convicted of stealing the cotton, and sentenced to nine months' imprisonment with hard labour. Appellant was convicted of receiving it, and sentenced to eighteen months' imprisonment with hard labour. Spiro Halikiopulo (*a*) was sentenced at the same time to eighteen months' imprisonment with hard labour.

L. F. C. Darby for the appellant (under sect. 10 of the Criminal Appeal Act), who was not present.

Powell and Shorrock were defended by counsel, while appellant was undefended.

(*a*) See p. 272, below.

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It is submitted, in the first place, that there was no direct evidence that the alleged cotton was stolen, and secondly, that appellant's case was never put to the jury.

There was evidence that Shorrock and Powell were employed in a cotton warehouse as porters in a sample room, and that the warehouseman swore that no cotton had been missed. As to the cotton produced by the police, he could only say that it was like cotton in the warehouse and in 200 more warehouses in Liverpool.

It was clear that Shorrock stored some cotton with Messrs. Vidiano, general commission agents in Union Street, and Theadorus bought it and removed it, upon September 7th, from Messrs. Vidiano to his place of business in Sparling Street.

Counsel submitted that the case was similar to *Pearson*, before this Court in 1908, 72 J. P. 449; 1 Cr. App. R. 77, when the Court quashed the conviction. In that case certain tubes had been missed, but there was no evidence given which shewed that the tubes in the accused's cart were the ones which were missed.

In the summing-up the learned judge never put appellant's case to the jury at all, and he dealt principally with the evidence as to the theft. At the end of the summing-up occurred the following passage:—

"I will say this. I think you ought not to find Theadorus guilty of stealing it. If you find him guilty, it must be of receiving and the other two prisoners of stealing it."

Nothing was said there as to the necessity of guilty knowledge, and the facts as to that were never put to the jury at all.

Moreover, the learned judge was betrayed into saying that Shorrock was paid 10*l.* 11*s.* for what was worth 20*l.* He was betrayed into saying that by counsel, who said 211*s.* was paid for 800 lbs. of cotton. In fact, the statement of Theadorus was true, that 6*l.* had been paid for the cotton in part payment until the cotton was weighed, and it was the usual practice to pay in that manner for cotton. Also the witness Vidiano had admitted buying cotton from Shorrock. That was true, and the date given for that purchase was July. The facts were that appellant had started business in August. He had bought this cotton early in September, when it had lain at Vidiano's a fortnight. He subsequently gave an order to a man named Roberts to move it on September 6th. It was moved on September 7th, taken to Sparling Street, the place of business of Theadorus, where it remained till October 4th,

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Dionysius Theodorus.

when the detective officer called. The statement which appellant made to that officer, so far as it had been checked, was true. He had told a cotton dealer he had bought this cotton from men and women in the street.

With regard to the sentence which had been imposed by the learned judge, appellant had been a cotton porter and clerk for ten years in Liverpool. In November, 1908, he lost his employment, and was supported by the unemployed fund. In August of 1909 he started as a general merchant with borrowed money. He bought this cotton on September 6th, viz., the cotton which was found on October 4th. When that cotton was found, no other stolen property was found on his premises. He was sentenced to eighteen months' imprisonment with hard labour, which is exactly the same as the sentence imposed on Halikiopulo (*a*), a receiver, against whom there was proof that he had received stolen twice, and had other stolen property upon his premises. Appellant had never been convicted before.

The Lord Chief Justice: In this case, dealing with the application for leave to appeal against the conviction, there was first of all undoubtedly evidence of a theft of a quantity of cotton, and a quantity of cotton was subsequently found in the possession of the appellant. With regard to this cotton which was found in his possession, he says in his statement that he bought it from two men with whom he had been previously connected when he was employed as a cotton porter. That statement which we have before us, and which has been referred to, is not consistent with the story he told at the trial, and when he gives an account of how he came to be possessed of the cotton one does not expect him to give different accounts. Receiving cases in which property has been stolen are obviously those in which an innocent prisoner would go into the box to give evidence at the earliest possible moment, but here, although he had been charged with receiving a considerable amount of cotton, he did not do so. We are of opinion that in these circumstances the jury properly found him guilty of receiving the cotton knowing it to have been stolen.

With regard to the sentence of eighteen months' imprisonment

(*a*) See p. 272, below.

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with hard labour passed upon a receiver of a considerable amount of property valued at about 20*l*., we think that no principle has been infringed, and we should not be justified in interfering with it.

Application dismissed.

Spiro Halikiopulo.

SPIRO HALIKIOPULO.

If on an indictment for receiving stolen property an attempt be made to prove the possession of other property alleged to have been stolen within twelve months, and the proof fail, the jury must be warned to disregard the evidence.

Whether a plea of guilty to an indictment for larceny be any evidence of such larceny, or the time of it, as against a defendant indicted for receiving, against whom it is sought to establish that the subject-matter of that indictment was "other property" found in his possession, quære.

This was an appeal against conviction on a point of law.

Halikiopulo was tried on December 1st, 1909, at the Liverpool Assizes, before Ridley J., for receiving, on three different dates, six bundles of twine, such as is used for making-up samples in cotton warehouses. Two alleged thieves were tried with him; these thieves had previously been tried in *Theadorus's* case (see above, p. 269). None of the accused gave evidence, and one of the alleged thieves and Halikiopulo were convicted. Halikiopulo was sentenced to eighteen months' imprisonment with hard labour.

Lindon Riley for the appellant, who was not present. There are four sufficient grounds of appeal. Dealing first with one that is covered by authority, evidence was given under sect. 19 of the Prevention of Crime Act, 1871, that 42 lbs. of rubber alleged to have been stolen by one Dixon had been found in the possession of the prisoner, but no proof was adduced that it had been stolen within twelve months, and the jury were not warned to disregard the evidence. *Girod*, 22 T. L. R. 720; 70 J. P. 514 (1906). The judge accepted as sufficient proof the fact that a theft of rubber of the same weight had been confessed before him, in the form of a plea of guilty, by Dixon in the same court on the same day. A police witness said that the rubber had been found on Halikiopulo's premises, and that it was the same which Dixon pleaded guilty to stealing, but how could he know? The rubber was probably not produced at the time of the plea, and the only identification of the rubber was a dealer's evidence that it was like rubber he dealt in, to which Dixon had access. Such a plea could not be evidence against a third person. This Court has set aside a plea of guilty at the instance of the man who made it, and quashed the conviction. *John Verney's case*, 2 Crim. App. R. 107; 73 J. P. 288 (1909). That shewed the possibility of such pleas being either mistakes or mere tactics.

[PHILLIMORE J.: Might it be not said that until set aside the record of such a plea, like a judgment *in rem*, is good against all the world?]

Even a judgment *in rem* would not be good against all the world on immaterial points. And time is an immaterial averment in an indictment for larceny. Even, therefore, if the plea of guilty were sound evidence of the stealing, it could not be evidence of the date of it, and the date here is vital.

[PHILLIMORE J.: But after a certain stage (when you objected to evidence of the buying of the rubber by someone being given, and the judge upheld your objection) the rubber was not referred to. It is not mentioned in the summing-up.]

No, that is what I complain of. The jury should, at least, have been told that Halikiopulo had pleaded not guilty to receiving the rubber. That was so; and that indictment is still untried. Then (1) there was no evidence Halikiopulo knew the twine was stolen. (2) There was no evidence he ever received the twine, except the evidence of his partner. His partner had entered all three transactions in the books and professed perfect innocence. He was a witness for the prosecution. It was the exact dilemma of *Carr*, 2 Crim. App. R. 317; 73 J. P. 508 (1909): if the partner could act as he did, innocently, why not the prisoner? If the partner had guilty knowledge, he was an accomplice and required to be corroborated. Ridley J. simply said that it was no argument that only one man was in the dock when two ought to be there. He further said that what he and the jury wanted was to hear the prisoner's counsel say he believed the twine had been received honestly. (3) The prisoner's trial came on immediately after another case of thieves and a receiver [the same alleged thieves,

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see p. 269, above], and the judge and prosecuting counsel made more than one reference to the previous case, to which Halikiopulo had been no party. The judge began his summing-up with the words :—"The case that we have now before us is very like the last one, but, of course, twine is not the same thing as cotton. The circumstances of each case must differ in some small matter." The fact was that the previous case involved hundreds of pounds weight of cotton which required a pony and cart to move it, and this case only involved sixteen bundles of twine said to be worth 3*s.* 6*d.* a bundle and bought by the prisoner's firm in three odd lots at 1*s.* 6*d.* a bundle. Such bundles easily pass from hand to hand.

H. Chaloner Dowdall, for the Crown: Apart from the rubber there was enough evidence to convict. Appellant bought the twine in an assumed name at less than half its price from persons who had no right to sell it. The accused gave evasive and incriminating answers to the detective. Insufficient proof of the rubber theft is not fatal to the conviction provided there was no improper admission of evidence on that point. Dixon was bound to plead, and his having done so was properly admitted in evidence. Dixon was charged immediately before the trial of the present case with stealing the rubber in September and admitted his guilt in the presence of the Court and of the prisoner. He was available for examination if there had been any suspicion as to his plea. The judge said he would direct the jury that Dixon's plea was evidence of the theft, but he did not do so.

[The LORD CHIEF JUSTICE: The question is, what effect this had on the mind of the jury.]

Lindon Riley, in reply: If you read the examination of the detective in the light of his cross-examination there is nothing incriminatory. And there was no proof that the twine had been recently stolen. There was, therefore, no such obligation to give an account of it as would justify weighing mere economy of statement or slight discrepancies very nicely.

PHILLIMORE J.: This conviction is not satisfactory. There was no evidence that the prisoner received the rubber, no evidence that the rubber produced was stolen, and very little evidence of the identity of this rubber. This makes it unnecessary to deal with all Mr. Riley's points, or to decide whether the plea of guilty in the rubber case was or was not evidence, or could have been made evidence. Even if it were, or could be, the identity of the subject-matter and the date of the stealing would have to be proved, and this may have been impossible. At all events, it was not done, and no warning or guidance was given to the jury. It was wrong to let the verdict of guilty in the other case into this case. There is, moreover, this remarkable circumstance to be borne in mind: the prisoner, on another indictment, had pleaded not guilty to receiving the very rubber alleged to have been stolen, and he had not even been put upon his trial for it. That charge and other charges still stand against the prisoner, and so to quash this conviction will not interfere with the course of justice. It was an unsatisfactory conviction and must be quashed.

Conviction quashed.

Lindon Riley: In *Sovosky*, 1 Cr. App. R. 100; 72 J. P. 435 (1908), the prisoner remained in gaol to await his trial on other indictments, but Halikiopulo was on bail up to the time of the trial which ended in the conviction just quashed. I apply for bail again.

The Lord Chief Justice: I doubt whether we have jurisdiction to grant bail. The prisoner is not going to gaol by force of anything we are doing. He is simply there awaiting trial on indictments which have been found against him. You can apply in the usual way.

Solicitor for the Appellant: *John Bateman*, Liverpool.

Solicitor for the Respondent: *E. R. Pickmere*, Town Clerk, Liverpool.

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Thomas
Henry
Goodwin.

THOMAS HENRY GOODWIN.

On an indictment under sect. 91 *of* 24 *&* 25 *Vict. c.* 96 (*the Larceny Act,* 1861), *there may be a conviction as an accessory before the fact by virtue of sects.* 1 *and* 2 *of* 24 *&* 25 *Vict. c.* 94 (*the Accessories and Abettors Act,* 1861).

Appellant was convicted on October 21st, after three days' trial at the Central Criminal Court, before the Recorder, for receiving stolen property. By the first count of the indictment William Moss was indicted for stealing one black gelding, and by the second count William Moss was indicted for stealing one gig, three sets of harness, and three rugs, and by the third count William Moss, William Gaskell, and Thomas Henry Goodwin were indicted for receiving one black gelding, one gig, three sets of harness, and three rugs, well knowing them to have been stolen. Moss pleaded guilty to the indictment. Gaskell admitted receiving the property, and the only question was as to his guilty knowledge. He was found guilty of receiving, and, on November 22nd, sentenced to nine months' imprisonment with hard labour, and Moss was sentenced to five years' penal servitude. No evidence was offered by the Crown shewing any receiving by Goodwin or that he had even seen the goods, the subject-matter of the charge, there was no evidence of possession or constructive possession, and at the close of the prosecution it was submitted by *D. Warde* that there was no case to go to the jury against Goodwin on the third count. It was contended by the Crown that inasmuch as Goodwin had been in correspondence with Moss and Gaskell respecting the goods, both before and after the theft, he could be convicted under the indictment as an accessory before the fact. On behalf of Goodwin it was contended that as he was indicted under 24 & 25 Vict. c. 96 (Larceny Act, 1861), s. 91, for receiving, and there had been neither an actual nor a constructive receiving, he could not be convicted under that Act nor under the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), ss. 1 and 2, as there was no count in the indictment charging him as an accessory. *Smith,* L. R. 1 C. C. R. 266; 39 L. J. M. C. 112; 22 L. T. 554; 18 W. R. 932; 11 Cox C. C. 511 (1870). The learned Recorder, referring to that case and to *Oddy,* 2 Den. C. C. 264; 20 L. J. M. C. 198; 5 Cox C. C. 210; 15 Jur. 517; T. & M. 593 (1851),

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Thomas Henry Goodwin.

held that the prisoner could be indicted under sect. 91 of the Larceny Act, and convicted under sects. 1 and 2 of the Accessories Act without being indicted under the latter Act. The prisoner was found guilty and sentenced to three years' penal servitude.

Daniel Warde, for the prisoner, adopted the same argument as that used at the trial.

Travers Humphreys, for the Crown, was not called upon.

Appeal dismissed.

HARRY ROWLAND.

Harry Rowland.

A defendant called on behalf of a co-defendant and confining his evidence to the latter's case, may be cross-examined as to his own case.

It is a sufficient "possession" within the second paragraph of sect. 19 *of* 34 *&* 35 *Vict. c.* 112 (*the Prevention of Crimes Act,* 1871), *if defendant has pawned the stolen property.*

An appeal against a conviction as a "habitual criminal" is subject to the proviso to sect. 4 (1) *of the Criminal Appeal Act,* 1907.

The appellant Rowland, together with one Bessant, were indicted at Middlesex Sessions, on November 29th, 1909, for breaking and entering a dwelling-house and stealing certain goods therein, and also for receiving such property knowing it to have been stolen. Both prisoners were convicted on the count for receiving, and appellant was also found to be a habitual criminal. Appellant, who had been sentenced by the Chairman to four years' penal servitude and eight years' preventive detention, appealed, by leave of Lord Coleridge J., against the convictions and the sentences.

C. L. Attenborough for the appellant (under sect. 10 of the Criminal Appeal Act), who was present.

(1) Improper evidence had been admitted. The appellant elected not to give evidence on his own behalf, but with his consent he was afterwards called as a witness for his co-prisoner Bessant. Appellant gave no evidence whatever in support of his own case, and did not allege in the witness-box anything on his own behalf,

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but confined his evidence to alleging the innocence of the prisoner Bessant. He was, however, then cross-examined at some length by counsel for the prosecution, with a view to shew that he, appellant, was guilty, the questions objected to relating to the manner in which he himself came to be possessed of the stolen goods with which he had been dealing. Counsel admitted that appellant was a competent witness, having regard to *MacDonald*, 2 Cr. App. R. 322; 73 J. P. 490; 53 S. J. 745; 25 T. L. R. 808 (1909); but he denied the right of the prosecution to cross-examine the appellant *upon his own case* with regard to which he had given no evidence.

(2) Before the conviction, evidence had been given by the prosecution that the appellant had been convicted on the 4th August, 1906, of an attempt to obtain money by fraud. It is submitted that this was not a case to which the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19, applies. The only evidence against appellant was that he had pawned a small portion of the stolen goods, and this was quite as consistent with larceny as with receiving (and it was so opened by counsel for the prosecution). The section ought not to be applied except in the case of a professional receiver. Moreover, no goods were at the time of his arrest found in his possession, as he had already disposed of them. All that was proved was that they had previously been in his possession. *Drage*, 14 Cox C. C. 85 (1878); *Carter*, 12 Q. B. D. 522; 53 L. J. M. C. 96; 50 L. T. 432, 596; 32 W. R. 663; 15 Cox C. C. 448; 58 J. P. 456 (1884); C. C. R.

(3) The notice to the appellant that it was intended to charge him with being a habitual criminal under the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10, was defective, in that it only alleged the previous convictions, and not the other grounds upon which it was intended to found the charge. Moreover, although three previous convictions had been proved appellant came out of prison after his last sentence, on the 16th February, 1909, and no evidence had been given that he had since then been leading persistently a dishonest or criminal life.

J. P. Grain, for the Crown, was only called upon on the last point. There was evidence that appellant had been leading a dishonest and criminal life since his last imprisonment. A police officer had asked appellant if he could furnish him with the name of any person or employer who could speak on his behalf at his trial, and

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the appellant said that there was no one to whom he could refer him. He had been six times previously convicted.

Attenborough, in reply: Those convictions were all before February, 1909. The fact that appellant did not give information to the police officer is no evidence that he had been leading a dishonest life.

The Lord Chief Justice: The first two objections to the conviction are not well founded. By the Criminal Evidence Act, 1898, s. 1, "Every person charged with an offence . . . . shall be a competent witness for the defence . . . . whether [he] is charged solely or jointly with any other person," and by sect. 1 (*e*) "A person charged and being a witness in pursuance of the Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged." Although the appellant had given no evidence that he himself was not guilty of the offence, by going into the witness box on behalf of the prisoner Bessant, he became a witness in pursuance of the Act and exposed himself to questions affecting his own case. With regard to the evidence of a previous conviction, this was substantially a case of receiving. There was no evidence that the prisoner stole the goods, but it was proved that he had dealt with some of them very shortly after the breaking in, and he could, therefore, in the absence of a satisfactory explanation, be rightly convicted of receiving them. He did not think that the words "the stolen property has been found in his possession," in the second paragraph of sect. 19 of the Prevention of Crimes Act, 1871, meant that the goods must have been actually found in his possession at the time of his arrest. For example, the property might have been pawned and the pawn tickets found in his possession. It is sufficient if the property had been in his possession. The point taken with regard to the sentence of preventive detention is more doubtful. If it was of importance that the jury should know what appellant was doing between February 16th and October 12th, the date of his arrest, we might say, as we did in *Kelly's case* [above, p. 252], that in the absence of any notice of "other grounds" the evidence was insufficient; and on this particular notice it is doubtful whether, in view of the interval from February to October, some questions ought to have been put. But having regard to the fact that the prisoner had been several

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times convicted—the three statutory convictions were in 1893, 1896 and 1902, and there were three other convictions, one as late as August, 1906, of which notice was given him—and that the jury had before them *his own* statement as to what he had been doing since his last release from prison, the Court is not prepared to say that there was no evidence upon which the jury could properly find that he was a habitual criminal within the meaning of the Act, or that the appellant was in any way injured by the defect in the notice given under the Act. As we said in *Waller's case*, the jury must have found that he was leading a persistently dishonest life, and that the proviso to sect. 4 (1) of the Criminal Appeal Act attaches.

Appeals dismissed.

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